A

SYSTEM

OF THE LAW OF

MARINE INSURANCES.

WITH THREE CHAPTERS,

ON BOTTOMRY,

ON INSURANCES ON LIVES,

ON INSURANCES AGAINST FIRE.

BY JAMES ALLAN PARK, Esq.

ONE OF HIS MAJESTY'S COUNSEL.

(NOW ONE OF THE JUDGES
OF HIS MAJESTY'S COURT OF COMMON PLEAS.)

Lex (de quâ agimus) *est fons æquitatis.* CICERO.

THE SEVENTH EDITION,
WITH CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.

VOL. I.

LONDON:

PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH AND SON, FLEET-STREET, AND
J. COOKE, ORMOND-QUAY, DUBLIN.

1817.

TO THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

LORD CHIEF JUSTICE, &c. &c. &c.

MY LORD,

I HAVE taken the liberty to dedicate this Edition of the Law of Marine Insurances to Your Lordship; for to whom could a Work of this nature be with more propriety addressed: — a Work intended to elucidate a subject, with which you were so peculiarly conversant while at the bar, and which has received such clear and powerful illustration from the decisions of Your Lordship, since you have presided in the highest Court of Judicature in the kingdom?

The

The permission which Your Lordship has granted of addressing you upon the present occasion has afforded me this public opportunity of expressing with how much respect and gratitude I am,

My Lord,

Your Lordship's very faithful

And obliged humble Servant,

J. A. PARK.

LINCOLN'S-INN FIELDS,
March, 1817.

ADVERTISEMENT

TO THIS

SEVENTH EDITION.

THE following Work being out of print, eight years having elapsed since the publication of the sixth, I have been much solicited to send forth a new Edition. The various duties of my present station would have made me shrink from so laborious a task: but respect for a profession, to which I have so many reasons to be attached, and which I so highly esteem, has induced me to overcome every difficulty. The labour of such an undertaking has been greatly enhanced by the unprecedented circumstances which occurred in *Europe* during the two last wars, and which called for a variety of decisions in our Courts, unknown before in the Law of Insurances. Those decisions I have endeavoured faithfully to incorporate in the following Work, as well as I could, under the several titles to which they respectively and peculiarly belong. But the judgments of late years have become of so much importance, and the learned judges have discussed the various topics that have occurred before them, with so

much accuracy, and with so earnest a desire to bring them within the principles already established, that I have seldom found myself at liberty to abridge, lest I should destroy the luminous mode in which the argument has by them been placed. The consequence has been, that I found it quite impossible to continue the former paging, without destroying at once almost all possibility of reference. I have therefore paged this Edition in the usual manner: and it is of the less consequence, because the new matter could not be found in any former Edition: and as this is probably the last time that I shall have to solicit, in my own person, professional or public attention to a Work, which has hitherto met with so great a portion of their esteem, I have been desirous to render this Edition as perfect as possible.

J. A. PARK.

LINCOLN'S-INN FIELDS,
March, 1817.

PREFACE

TO

THE FIRST EDITION.

WHEN a man presumes to solicit publick notice for any work of a literary nature, the world have a right to know the motives, that induced him to write, and upon what foundation he builds his claim to their attention. Notwithstanding the number of cases, which have of late years been determined in the *English* courts of justice upon the law of insurance, and the uniformity of principle, which pervades them all; yet the doctrine of insurances is not fully known and understood. This in some measure happens from the decisions upon the subject being scattered in the various books of reports, according to the order of time in which they were determined; and the connexion of which, from the nature of those publications, cannot be preserved. As many persons cannot spare time, and few will take the trouble, to collect the cases into one point of view; and as all cases of insurance must necessarily be attended with a number of facts, it is not to be wondered at, if from a cursory, inattentive, and unconnected perusal of them in a chronological order, a great part of the world should remain unacquainted with the true principles of insurance law. No book that I have met with in the *English* language*, has ever yet attempted to form this branch of jurisprudence into a systematick arrangement, or to reduce the cases to any fixed or settled principles.

* Originally written in 1786.

Convinced

Convinced of the utility of such a work, I thought I could not employ my time more advantageously to my profession or myself; nor better express that respect which I, in common with every lawyer, feel for the venerable magistrate (*a*), to whom this work is inscribed, and for the other learned judges, who have assisted in erecting this fabrick, than by extracting all the cases upon this subject from the mass of other learning, with which they lie buried in the reporters; and thereby endeavouring to prove to the world that the doctrine of insurance now forms a system as complete in every respect as any other branch of the *English* law. Could any other incitement have been requisite, the opinion of Mr. Justice *Blackstone* would have had considerable weight. "The learning relating to marine insurances," says that elegant commentator (*b*), "has of late years "been greatly improved by a series of judicial deci- "sions, which have now established the law in such "a variety of cases, that (if well and judiciously "collected) they would form a very complete title "in a code of commercial jurisprudence." Urged by these motives, I was induced to undertake this work, which is now presented to the world.

No subject can be properly understood, unless the materials be methodically arranged; and therefore the first object I had in view was to fix upon certain heads, which would be sufficient to comprehend all the law upon insurances. For this part of the work I alone am accountable, the design being entirely my own. It may, however, in some degree abate the

(*a*) The late *William* Earl *Mansfield*, to whom the first and second editions of this work were dedicated.

(*b*) 2 *Blackst. Com.* 490.

severity

severity of censure to recollect, that in the arrangement of the subject I had no example to follow, no guide to direct me; and I was left entirely to the impulse of my own judgment. But to enable the profession to judge of the nature of my plan, I will state the reasons that influenced me in the mode I have adopted.

As the policy is the foundation, upon which the whole contract depends, I have begun with that, and endeavoured to shew its nature and its various kinds; and I have also pointed out the requisites which a policy must contain, their reason and origin, as they are to be collected from decided cases, or the usage of merchants. When we have ascertained the nature of a policy, the next object is to discover by what general rules courts of justice have guided themselves in their construction of this species of contract. It is then necessary to descend to a more particular view of the subject, and to fix with accuracy and precision those accidents, which shall be deemed losses within certain words used in the policy. Thus losses by perils of the sea, by capture, by detention, and by barratry, will be a material ground of consideration. When a loss happens, it must either be a partial, or a total loss; and hence it becomes necessary to ascertain in what instances a loss shall only be deemed partial, in what cases it shall be considered as total; and how the amount of a partial loss is to be settled: hence also arises the doctrine of average, salvage, and abandonment. These points therefore will be the next object of attention.

Having considered the various instances in which the underwriter will be liable upon his policy, either for a part, or for the whole amount, of his subscription;

tion; we seem to be naturally led to the consideration of those cases in which the underwriter is released from his responsibility. This may happen in several ways: For sometimes the policy is void from the beginning, on account of fraud; of the ship not being seaworthy; or of the voyage insured being prohibited. There are also cases, in which the insurer is discharged, because the insured has failed in the performance of those conditions, which he had undertaken to fulfil; such as the non-compliance with warranties; and deviating from the voyage insured: These and many other points of the same nature occupy several chapters.

When the underwriter has never run any risk, it would be unconscionable that he should retain the premium: Therefore after considering those instances, in which this is the case, it is natural next to ascertain in what cases the underwriter should retain, and in what cases he should return the premium.

It would be in vain to tell a man, that he was entitled to the assistance of the law, and that his case was equitable and right, without pointing out in what *forum*, and by what mode of proceeding he should seek a remedy. I have endeavoured to point out the proper tribunal, to which the person injured is to apply; the mode of proceeding, which he is to adopt; and the nature of the evidence he must adduce to substantiate his claim, with respect to this contract: After the discussion of marine insurances, I have added three chapters upon subjects, which, though they do not form a part of the plan, are so materially connected with it in the rules and principles of decision, that it seemed to me the work would be defective without them: These are, bottomry and respon-

respondentia; insurances upon lives; and insurances against fire.

When I planned this work, I intended to prefix an introduction, containing a short, historical account of the rise and progress of insurances in this country only. But upon the suggestion of one, to whose opinion I bow with deference, and whose judgment will always command obedience; I was induced to enlarge my design. The reader will now find a short account of such of the antient maritime states, as have promulgated any system of naval jurisprudence; and also, of the progress of marine law among the various states of *Europe*. I have endeavoured to trace the origin of insurance to its source; to point out those countries in which it has flourished, and the progress and improvement of it in our own. Such is the arrangement, which I have adopted, and on the propriety of which, the world and the profession are to decide.

As to the mode of treating the subject, it will be proper to observe that, at the head of each chapter, I have stated the principles, upon which the cases on that point depend; and then have quoted the cases themselves to shew, that they are agreeable and consonant to the principles advanced. If there are any cases, which seem to differ from the others, I endeavour to prove, either that they depend upon different principles, or that there are circumstances in them, which make them exceptions to the general rules. In quoting cases, I have been careful minutely to state all the circumstances, and also the opinion of the court without any alteration, or comments of my own; convinced that the utility of a work of this kind consists in the true and accurate

account

account of what the law is, not in idle speculations of a private man, as to what the law ought to be. Besides, one main purpose of such a composition is, to save the professors of the law the trouble of turning over vast volumes of reports, by collecting into one book, all the cases upon a particular subject.

But unless the cases are fully and faithfully reported, recourse must still be had to the original reporters, and the end of such a compilation is defeated. At the same time it ought to be observed, that sometimes, though not very often, several different points arise in one cause; and then, in order to preserve the system complete, it is necessary to separate them, and to assign to each its proper place. But still the opinion of the court is given fully on each of the points; and a reference is made from one part of the case to the other.

I had it in contemplation to have had a distinct chapter for the consideration of the law relative to this species of contract in other countries of *Europe*. But upon reflecting that insurances are founded upon the great principles of natural justice, rather than upon any municipal regulations; and that consequently the law must be nearly the same in all countries, I relinquished the idea. Besides, I have throughout the work, which seemed to be a better plan, taken notice in what respects the positive institutions of other maritime states agree or disagree with those of our own: A plan, which serves to illustrate and confirm the *English* system.

It remains to speak of the materials I have used. Conscious that the value of a law book depends upon the purity and excellence of the sources, from which

its contents are taken, I have never advanced any position, without referring to the book in which it was found; unless it be upon some unsettled point, where I have stated the arguments that may be adduced on both sides, and left it to the reader to form his own conclusions. In my researches upon this occasion, I have consulted every foreign author that I could possibly obtain; and have made as much use of their labours, as the nature of the plan would admit.

With respect to the decisions of the *English* courts of justice, I believe I have not omitted a single case, that ever has appeared in print upon the subject: Besides which, this collection contains a great number of manuscript cases, of which some have been determined at *Nisi Prius* only, and many have been the subject of deliberation in court upon cases reserved, or upon motions for new trials. For the latter, I myself am chiefly responsible, and upon some future occasion, I shall be happy to correct any errors, which they may contain; as most of them were taken while I was a student, merely for my private use, without any view to future publication. I have, however, by comparing them with such notes as I could obtain, done every thing in my power to render them worthy of the attention of the profession. As to the *Nisi Prius* notes, I am indebted for them to the very liberal and generous communications of my young professional friends; and to some also of those, who are in the first rank at the bar. Indeed, to name any one, would be an injustice to the rest; and therefore, I must beg they will accept my general acknowledgments. I should, however, be undeserving of that attention and assistance with which I have been honoured, were I to omit this opportunity of returning my sincere and grateful thanks

thanks to Mr. *Justice Buller*, whose abilities are only equalled by his easiness of access, his ready and liberal communication of that knowledge, which is the natural result of such talents, and such unwearied application to study. The many valuable hints I have received from that learned judge, will no doubt contribute much to the utility of this work.

To those who are much engaged in the labours of the profession, a full and complete table of the principal matters is of the utmost consequence. I have used my endeavours to render this part of the work as useful as possible, by stating each point under all the heads, that will naturally be resorted to for the solution of any doubt.

Having thus explained the nature of my arrangement, the mode which I have adopted in the discussion of each chapter, and the sources from which my information is derived, I present this volume to the public. The utility and necessity of such a work are universally acknowledged; the attempt is therefore deserving of some praise, and for the defects in the execution I throw myself upon the candour of my profession. The subject was noble, and required greater talents than mine to treat it as it deserved; but if I shall have at all done justice to the great abilities of those distinguished characters, whose names appear in every page, I shall in some measure have attained the object of my wishes, and shall have the pleasure of reflecting, that the time I spent in the composition of this work, has been at least productive of much personal satisfaction and improvement.

December, 1786.

CONTENTS.

CHAP.

APPENDIX.

INDEX

OF

CASES CITED.

Those Cases in *Italics* were never before in Print.

For-

Langdale

Mellish

Royal

INTRODUCTION.

WHEN we consider the wonderful effects which commerce has produced on the manners of men, when we observe that it tends to wear off those prejudices which give birth to dissensions and animosities, that it unites mankind by the strongest of all ties, the desire of supplying mutual wants; and that it disposes them to peace and concord, by establishing in every community an order of men, whose interest it is to preserve public tranquillity; we are led to think that the history and progress of it would not only be amusing, but highly important and instructive to the inhabitants of every civilized society. Such a work would be in fact the history of the intercourse and communication of mankind, and must necessarily abound in events the most interesting to every social being, but particularly so to the people of this country, whose great importance in the eyes of *Europe* originated in commerce, and will endure no longer than whilst the same attention continues to be paid to her commercial interests. In a dissertation upon commerce, Insurances form a very distinguished part, and therefore it cannot but be agreeable to the scholar as well as to the lawyer, to trace this branch of commercial law to its source, and to give some account of those various nations, which have been rendered famous by the extent of their commerce, and by the excellency of their maritime regulations. Indeed, in tracing the origin of Insurances, an account of the maritime states, that have existed in the world, necessarily forms a part of the enquiry.

2 Blackst. Comm. 458. Insurance, then, is a contract by which the insurer undertakes, in consideration of a premium equivalent to the hazard run, to indemnify the person insured against certain perils or losses, or against some particular event. When insurance in general is spoken of by professional men, it is understood to signify marine insurances. It is in this light we are at present to consider it; and from the preceding definition it appears to be a contract of indemnity against those perils, to which ships or goods are exposed in the course of their voyage from one place to another. The utility of this species of contract in a commercial country is obvious, and has been taken notice of by very distinguished writers upon commercial affairs. 3 Smith's Wealth of Nations, p. 148, oct. ed. Insurances give great security to the fortunes of private people, and by dividing amongst many that loss, which would ruin an individual, make it fall light 1 Magens, 2. and easy upon the whole society. This security tends greatly to the advancement of trade and navigation, because the risk of transporting and exporting being diminished, men will more easily be induced to engage in an extensive trade, to assist in important undertakings, and to join in hazardous enterprises; since a failure in the object will not be attended with those dreadful consequences to them and their families, which must be the case in a country where insurances are unknown. But it is not individuals only that derive advantages from the increase of commerce, the general welfare of the public is also promoted. It is an observation justified by experience, that as soon as the commercial spirit begins to acquire vigour, and to gain the ascendant in any society, we immediately discover a new genius in its policy, its alliances, its wars and negotiations. No nation that cultivated foreign commerce, ever failed to make a distinguished figure on the theatre of the world, as the history of the

the ancients sufficiently proves; and in proportion as commerce made its way into the various states of *Europe*, they turned their attention to those objects, and assumed those manners, which distinguish polished nations, and which lead to political consequence and eminence amongst the neighbouring powers. (*a*)

The origin of insurance, like that of many other customs, which depend rather upon traditional than written evidence, and for the honour of inventing and introducing which rival nations contend, has occasioned much doubt among the writers upom mercantile law. Indeed it is involved in so much obscurity, that, after all the researches which have been made on the present occasion, any very satisfactory solution of this doubt cannot be promised. One truth however is clear, that, wherever foreign commerce was introduced, insurance must have soon followed as a necessary attendant, it being impossible to carry on any very extensive trade without it, especially in time of war. Some of these writers have ascribed the origin of this contract to *Claudius Cæsar* the fifth *Roman* emperor, on account of a passage to be found in *Suetonius*. Other respectable authorities have given the honour of it to the *Rhodians*, thus laying a foundation for the idea entertained by many, that the law of insurance had obtained a place in most of the ancient codes of jurisprudence. As the consideration of this question will be attended with pleasure, it will tend much to the complete investigation of it, to consider the state of commerce amongst the most distinguished of the ancient nations, from whence it will appear, that insurances were in those

Molloy, Malyne.

2 Atkyns, 554.

(*a*) Vide Robertson's View of the Progress of Society in Europe.

days wholly unknown; or, if they were known, that the smallest proofs of the existence of such a custom have not come down to the present times.

Schomberg's Observ. on Rhodian laws.

The *Rhodians* claim the first place in this enquiry: for although there is undoubted testimony, that nations of much greater antiquity than the people of *Rhodes* (*a*), cultivated commerce, and carried it on to a considerable extent, yet there does not appear to be the smallest ground for entertaining an opinion that any of these naval powers had established amongst themselves, much less communicated to mankind in general, any code or system of marine law. *Rhodes* obtained the sovereignty of the sea, about 916 years before the *Christian Æra*, which was almost 200 years before the building of *Rome*. The situation and fertility of this island were peculiarly favourable for the purposes of navigation, for it lies in the *Mediterranean* sea, a few leagues from the continent of *Lesser Asia*; and its wealth and fertility have always been celebrated by the poets and historians of antiquity. From these circumstances, joined to the activity and industry of the people, it long maintained that superiority which it had acquired; its inhabitants were rich, its alliance was courted, though, from principles of policy, it generally observed a strict neutrality. Notwithstanding this pacific disposition, which commerce naturally inspires, the *Rhodians* at last became an object of jealousy, and were most furiously attacked and besieged by various foreign powers. But in all their wars they discovered their great strength

See Anderson's Hist. of Commerce.

(*a*) Eusebius, in his account of the maritime states, mentions three anterior to the Rhodians; namely, the Cretans, the Lydians, and the Thracians; the first of whom flourished about five hundred years before the Rhodians, the next two hundred, and the last, about eighty years. Euseb. Chronicon. lib. 2.

and

and superiority by sea, and conducted their enterprises with so much activity and skill, as to attract the admiration of their enemies, and the applause of those historians who have given an account of the wars in which they were engaged. In the *Punick* wars, the *Romans* found the benefit of their alliance, by the very essential service which they performed, in attacking the naval armaments of the *Carthaginians*. Polybius, lib. iv. Schomb. Obs.

Wealth naturally produces luxury, which gradually enervates the powers of a state. This was the case with the *Rhodians*; for after maintaining their political importance from the time already mentioned till the termination almost of the *Roman* republic, they visibly began to decline in wealth and power. *Cicero*, in his speech on the *Manilian* law, observes, that they were a people, whose naval power and discipline remained even to the time of his memory; and *Cicero* expired with the republic. Cicero pro lege Manilia, cap. 13.

From this short history it appears, that the *Rhodians* were very famous for their naval power and strength: but however respectable they might be on that account, they were much more illustrious, and obtained a much higher praise among the nations of antiquity, for being the first legislators of the sea, and for promulgating a system of marine jurisprudence, to which even the *Romans* themselves paid the greatest deference and respect, and which they adopted as the guide of their conduct in naval affairs. These excellent laws not only served as a rule of conduct to the ancient maritime states; but, as will appear from an attentive comparison of them, have been the basis of all modern regulations respecting navigation and commerce. The time at which these laws were compiled is not precisely ascertained: but we may

 reasonably

reasonably suppose, it was about the period when the *Rhodians* first obtained the sovereignty of the sea, which was about 916 years before the æra of Christianity. *Selden* says, that the *Rhodians* maintained the sovereignty of the seas 23 years; and that their laws were compiled in the days of *Jehosaphat*, king of *Judah*. This opinion agrees exactly with the preceding calculation; for this king began his reign about 914 years before the birth of Christ. Notwithstanding this, it will always remain a doubtful point, when they were compiled; nor perhaps is it very material that it should be accurately ascertained. It is of more consequence to know when they were adopted by the *Romans;* but that is also a fact involved in some obscurity. We meet with no traces of them in the time of the republic; and from the manner in which *Cicero* mentions them in the speech last alluded to, he treats of them as laws, which had gained the admiration of the world, rather than of such as then made a part of the *Roman* code. *Selden* says, that they obtained a place in the *Roman* law in the reign of *Tiberius Claudius*, a conjecture in which he is supported by *Peckius*, one of the commentators on the laws of *Rhodes*, and by the well-known character of *Tiberius* himself, who discovered the greatest attention to maritime affairs, and gave many signal instances of his attachment to *Rhodes*. But although these islanders were thus famous for their laws, we cannot discover from the fragments that have come down to our times, that they had the smallest idea of the contract of insurance; nor is there any tradition to induce us to conjecture, that they ever were acquainted with that mode of securing their property. It is true, that this is not a conclusive argument; because, although no such contract is mentioned in the fragments which we have, it by no means follows that

Selden's Mare clausum, lib. 1. cap. 10. s. 5.

Schomberg. Observ. on Rhodian Laws.

Mare clausum, lib. 1, cap. 10. s. 5

Sueton. Vita Tiberii Claudii.

it did not form a part of their whole system, more especially as *Emerigon*, a very celebrated *French* writer, is of opinion, that the real laws of the *Rhodians* have never reached us; and that the fragments, which we see, are certainly apocryphal. But as these laws were adopted by the *Romans*, it is fair to conjecture, that whether we have the real regulations of *Rhodes* or not, we should have the contract of insurance, if it had been known to them, incorporated with the other naval laws in the Imperial code. This idea is countenanced by the contract of bottomry, which is to be found in the fragments of the laws of *Rhodes*, and with which the people of that island were certainly acquainted; and in every book of the civil law, the contract *de nautico fœnore, de usurâ maritimâ*, also forms a considerable part. It is not going too far then to presume, that, as the *Romans* adopted a contract so beneficial to commerce, as that of bottomry, they would not have passed over a contract, of which the influence is still more extensively useful in the promotion of navigation and trade, if those, from whom they borrowed their naval laws, had themselves been acquainted either with its nature or advantages.

Emerigon, Traité des Assurances, Preface, p. 3.

Leg. Rhod. s. 1. art. 24. s. 2. art. 10. Digest, lib. 22. tit. 2. Cod. lib. 4. tit. 33.

Having said thus much of *Rhodes* and its laws, let us turn our attention shortly to the commerce of the *Greeks*. It is certainly true, that commerce flourished very much in several of the states of *Greece*, particularly in *Corinth* and *Athens*. The former separated two seas, was the key of *Greece*, and a city of the utmost importance; its trade was extensive, having a port to receive the merchandises of *Asia*, and another, those of *Italy*; and that there have been but few cities where the works of art were carried to so high a degree of perfection. *Athens* indeed was par-

Montesq. Esprit des Loix, liv. 21. c. 7.

Taylor's Civil Law, p. 507.

particularly famous for commercial knowledge; for their manufactures of all sorts were in high repute, and emulation was excited by the public rewards and honours which were bestowed upon those who attained to excellence in any of the useful arts. The attention of this people to maritime affairs, (for they aimed at the sovereignty of the sea and obtained it,) contributed much to their skill in navigation. The many laws which they left to posterity, with regard to imports and exports, and the contract of bargain and sale; the many privileges granted to the mercantile part of the state; the appointment of magistrates, who had the cognizance of controversies that happened between merchants and mariners; the attention which they paid to their market, and the many officers concerned in that department, give us a very favourable idea of their judgment in the true principles of commerce. But notwithstanding this, the *Athenians*, being of a very ambitious disposition, being more attentive to extend their maritime power than to enjoy it, and having a government of such a cast, that the public revenues were distributed among the common people to be squandered at their pleasure (*a*), did not carry on so extensive a trade as might naturally be expected from the number of their

Potter's Grecian Antiq. vol. 1. p. 80. 83, 84. 167.

(*a*) From several of the orations of Demosthenes it appears, that the poor were entitled to receive from the public stock, as much money as would admit them to the diversions of the theatre; and besides this, it was made a capital offence for any one to propose the restoration of the theatrical money to its original uses. This custom was at length so much abused, that, under pretence of theatrical money, almost all the public funds were distributed among the people. Hence the Athenians contracted an aversion for war, and spent their time and money upon public shows. Of this enormity Demosthenes vehemently complains, and inveighs against it with as much warmth as, from the nature of the law just mentioned, he durst venture to do. See the first and also the third Olynthian.

seamen,

seamen, from the produce of their mines, from their influence over the cities of *Greece*, and from those excellent laws and institutions, which have been just enumerated. Their trade was almost entirely confined to *Greece* and to the *Euxine* sea. From such of their laws as we have seen, and from such accounts as we have obtained of their naval history, we have not the smallest reason to suppose, that celebrated people knew any thing of the contract of insurance.

Montesq. Esprit des Loix, liv. 21. c. 7.

Some notice should have been taken before now of the *Phœnicians*, an ancient commercial and opulent people. Indeed, the height of grandeur to which they attained is a sufficient proof of the vast resources of a commercial nation. Many writers, both sacred and profane, from their florid and magnificent descriptions, give a vast idea of their wealth and power. I forbore to speak of them till I should have occasion to mention one of their colonies, that of *Carthage*, which, in opulence and the extent of her commerce and naval power, equalled, if not surpassed, the parent state herself. Whether either, or both, of these maritime powers ever promulgated any code of naval law cannot now be ascertained: for the former was entirely destroyed by *Alexander the Great;* and that it might never be restored, he removed its marine and commerce to *Alexandria*, in which removal, probably all its naval regulations might be lost. *Carthage*, on the other hand, having long disputed with *Rome* the empire of the world, was at last obliged to yield to her victorious rival, who, even after she gained the victory, retained such an hatred to the *Carthaginians*, that she rooted out every vestige of their former greatness. No time, however, nor the hatred of the *Romans*, can wholly obliterate the amazing accounts which have come down to us, of the enterprising spirit,

Beawes, Lex Mer. red. 4th edit. Introd. p. 3.

Quint Curtius, lib 4. c. 8, &c.

spirit, and hazardous voyages of the *Carthaginians*, almost exceeding the bounds of credibility. Thus much is certain, that they took such distant voyages, and went so far even without the *Mediterranean*, both to the *South* and *North* of it, as induced many people to suppose, that they were acquainted with the use of the compass. It is evident, however, that they only followed the coasts. Besides, the ancients might sometimes have performed such voyages, as would make one imagine they had the use of the compass: for if a pilot were far from land, and during his voyage had such serene weather that in the night he could always see the polar star, and in the day, the rising and the setting sun, he might regulate his course by them, nearly as we do now by the compass. This however must be a fortuitous case, and not a regular plan of navigation. (*a*)

Anderson's Hist. of Commerce, Introd. p. 31, 32, fol. ed.

Montesq. liv. 21. c. 8.

From a slight attention to the commercial and maritime history of the *Romans*, it will appear that they were as great strangers to the contract of insurance, as any of those people, of whom much has been already said. It seems to be universally agreed that the *Romans* were never very conspicuous as a maritime power, considered either in a commercial or

(*a*) What I have said in the text has been supposed by some not to do sufficient justice to the commercial and enterprising spirit of the Phœnicians, who are said to have visited Britain about 900 years before Christ.* I have already admitted the almost incredible voyages which they performed; but as it is also undoubtedly true, that they were unacquainted with the mariner's compass, the honour of discovering which was reserved for later times, they must, in most cases, have followed the coasts. Nor does their visiting Britain militate against this idea; for by attending to the situation of the two places, the voyage might have been performed, though no doubt very tediously, without once losing sight of land.

* See Borlase's Hist. of Cornwall, p. 27, and Henry's Hist. of Great Britain, book 1 chap. 6.

warlike

warlike point of view. In the latter case they relied chiefly on their land forces, who were disciplined to stand always firm and undaunted; and till towards the latter age of the republic, when we read of some wonderful naval exertions, they do not seem to have possessed any thing of a marine establishment. They never were distinguished by a jealousy for trade, and even when they attacked *Carthage*, they did it as a rival for empire, and not for commerce. It is recorded by historians, that till the first *Punick* war, upwards of 400 years after the building of the city, the *Romans* were so entirely ignorant of ship building, that they took for a model a *Carthaginian* galley, which had been accidentally stranded at *Messina*. *Carthage*, it must be observed, was at that time in her zenith of power and greatness; and yet from the model of one of her gallies, the *Romans* were able in sixty days from the time the timber was cut down, to fit out and man for sea, one hundred gallies, of five tiers, and twenty of three tiers of oars. Such were the ships of the famous *Carthage*. The spirit of the people of *Rome* was entirely averse from commerce; and fully justifies what was said by a celebrated *Roman* historian, "*sese quisque hostem ferire, murum* "*adscendere, conspici, dum tale facinus faceret, pro-* "*perabat; eas divitias, eam bonam famam, magnamque* "*nobilitatem putabant.*" These exploits were the only glory of a *Roman*, no employment was deemed honourable but the plough and the sword, and every species of gain was deemed disgraceful to those of Patrician rank. But it was from the constitution of the government, that individuals were possessed of this warlike spirit, so contrary to that which leads to eminence in commercial pursuits. The cast of their civil government was of a military nature; and for a considerable time, the civil and military officer was the

Montesq. liv. 21. c. 9.

Ferguson's Rom. Rep. vol. 1. p. 100.

Sallust. Catilina, c. 7.

Livy, lib. 21. c. 63.

Taylor's Civil Law, p. 502.

the same person; he distributed justice in *Rome*, and commanded their legions in the field, till the vast increase of their empire, and the multiplicity of civil business, occasioned a separation. The natural consequence of this was, that no man who was not of the profession of his country, was much esteemed at *Rome*; and accordingly we find that traders and mechanics were incapable of succeeding to any public honours. Nay, so far was commerce from being encouraged at *Rome*, that it was deemed prejudicial to

Taylor, 498.

the state. The *Romans*, by humanity, terror, triumphs, tributes, and taxes, which they imposed on the conquered countries, increased the riches of their city. Laws were passed to prevent the exportation of their gold; the reason of which seems to be, that it carried away their money and brought them nothing in return but luxury, the bane of virtue, and

Civil Law, 501.

destruction of empire. Could it be expected, says Dr. *Taylor*, that a people of soldiers, whose trade was their sword, and whose sword supplied all the advantages of trade; who brought the treasures of the world into their exchequer, without exporting any thing but their own personal bravery; who raised the public revenues, not by the culture of *Italy*, but by the tributes of provinces; who had *Rome* for their mansion, and the world for their farm; should have leisure to set forward the articles of commerce, or be likely to pay any regard to the character of its professors? The terms of defiance, upon which they lived with all mankind, in consequence of this martial spirit, would have prevented all the good effects of commerce, had their disposition allowed them to pursue it. That restless spirit, which kept their armies on foot, and their swords in their hands, for a succession of centuries, was fatal to factories and correspondence. The world was in arms, and in-

surances

surances and under-writing were but a dead letter. This is very nearly a true representation of the case, for it is certain that not one law was made in favour of commerce, in the time of the commonwealth; on the contrary, it was greatly discouraged as introductory of luxury, which was supposed not to be compatible with the severity of their manners. It is also no less true than singular, that a people who were so well acquainted with the true principles of natural reason and justice, who applied those principles with so much propriety to the various wants and necessities of human society, and who had the honour of establishing a system of law, which has been adopted as the rule of action by the greatest part of *Europe*, and which continues to be so even at the present day, never attempted to introduce any plan of maritime jurisprudence. Nay, this idea is carried farther by some writers, who declare, and I believe with truth, at least we can discover nothing to the contrary, that the *Romans* did not even take the pains to digest the materials which they had borrowed; and that whilst they carried every other branch of law to the highest pitch of accuracy and refinement, they were content to stand indebted to one of their own provinces both for the form and matter of their maritime code.

Schomberg's Observation on the Rhodian Laws.

The *Romans*, it is true, after the first *Punick* war, constantly maintained a fleet; but long after that time, even in the year of the city 563, it was observed of them, that they were very unskilful in the art of navigation. One of their own historians, who flourished at the time of the second *Punick* war, and who was tutor to the great *Scipio*, justly remarks, that at no period did they ever make any figure at sea as a commercial power. Even when they arrived at their highest perfection in naval skill, their fleets were never employed

Polybius

employed for the purposes of trade, in the discovery of new states, or establishing commercial intercourse with those they already knew. The greatest extent of their commerce was to bring to the market of *Rome* that corn, which they collected in the various granaries of *Sicily*, *Africa*, and *Egypt*. Upon all other occasions the business of their fleet was to overawe the conquered, and to transport to *Rome* the spoils of ruined provinces. In such a state of commerce, it is impossible that insurances could exist; and we have already quoted the opinion of a respectable author to show that they were unknown.

Dr. Taylor, ut supra.

There are several reasons applicable to all the ancient maritime powers, which seem to prove to demonstration, that insurances were not in use. We have seen, that insurances are only introduced where commerce is widely extended. The commerce of the ancients, compared with modern times, could not be very considerable, as it was chiefly confined within the *Mediterranean*, *Egean*, and *Euxine* seas; to which they were compelled more from necessity than inclination. *Carthage* in all her glory had not arrived at any great degree of perfection in the art of ship-building. Vessels of the best construction at that time could only be navigated with oars, or when they had a fair wind on a smooth sea: they might be built of green timber; and in case of a storm, could run ashore under any cover, or upon any beach that was free from rocks: in short, they were merely gallies, and were managed with the greater difficulty on account of the position of the sails, and the mode of rigging practised in those days. This could not fail of proving a considerable obstacle to the extension of commerce. But when we consider, in addition to the bad construction of their ships, that the ancients

Anderson's Hist. of Commerce.

Montesq. Esprit des Loix, liv. 21. c. 6.

were

were utterly ignorant of that unerring guide, the mariner's compass, (the honour of inventing which was reserved for more modern times,) by reason of which they durst not venture out of sight of land, for fear of being overtaken by tempests, and being left at large in the boundless ocean, their commerce could not have been great; although we are even led to admire the progress which they made in commercial affairs. It is true, that many distant naval expeditions were made under all these disadvantages, which often proved fatal to the adventurers. (*a*) These expeditions, however, could add little or nothing to their maritime or geographical skill, in which the ancients were certainly very deficient, on account of the necessity they were always under of coasting the shores, for want of a better guide; and indeed, the shores were the only compass. These observations are not intended to detract from that merit, which has been already allowed to the ancients for their naval exertions; because they are founded merely on a comparison of their powers and knowledge in those arts with improvements of the moderns, and are adduced to show that, under such disadvantages and obstacles to the extension of their trade and commerce, it was impossible that insurances could be at all known to the ancient world.

Montesq. vol. ii. c. 6.

M. *Emerigon* agrees, that the contract of insurance, as it is understood at this day, was not in use amongst the *Romans*; but he thinks he discovers some traces of it in the history of that people. The first instance given by this learned writer is this, that about the time of the second *Punick* war, those who had un-

Preface to his work, p. 4.

(*a*) Huet, bishop of Avranches, in his very instructive and entertaining treatise on the commerce and navigation of the ancients, has, with infinite labour and accuracy, collected the most remarkable facts on this head. Ch. 8.

dertaken

dertaken to supply the troops in *Spain* with provisions and military stores, made it a previous condition that the republic should be at the hazard of exporting them, according to the words of *Livy*, "*Ut quæ in* "*naves imposuissent, ab hostium tempestatisve vi, pub-* "*lico periculo essent.*" But with all deference to so great a name, this seems to bear no resemblance to the contract of insurance; for it is nothing more than every well-regulated state is bound to do by the ties of natural justice. It is equitable and right, that those, who in times of public danger appropriate their private wealth to the advancement of the public service, should be reimbursed from the purse of the state for the private losses they may sustain. This indeed is the rule of conduct between man and man: for when one man purchases goods of another to be sent abroad, was it ever supposed that the seller was to run the risk of the voyage: or that if the goods perished, he was never to be paid? If such a doctrine were to prevail in any country, the state could only be supplied with necessaries in time of war, by means of extortion, rapine, and violence.

Livy, lib. 23. c. 49.

Another instance given by *Emerigon* is a story, which we find recorded by *Livy*, of some men who were charged with the care of exporting provisions for the army, and who *quia publicum periculum erat a vi tempestatis in iis quæ portarentur ad exercitus*, endeavoured by fraud to destroy the ship, and then told the directors of the state, that many very valuable articles were on board; whereas they had taken care to send out very old, rotten ships, in which were a few commodities, and those of small value. That part of this story which is material to the present enquiry, has already met with an answer in what was said upon the last quotation: and the propriety of a government's

Traité des Assur. loc. cit. Livy, lib. 25. c. 3.

ment's indemnifying those who might suffer in the public service, is not at all altered by the misconduct of some individuals. (*a*)

The next instance is from one of *Cicero*'s epistles, and is of a different nature from those last mentioned; because here *Cicero* seems to wish that the property in question should be secured, not only for himself, but also for the people of *Rome*. *Cicero*, having gained a victory in *Cilicia*, and the civil war between *Cæsar* and *Pompey* being then a matter almost unavoidable, wrote to *Caninius Sallustius* at *Laodicea*, in which letter he uses these words: "*Laodiceæ me* "*prædes accepturum arbitror omnis pecuniæ publicæ*, "*ut et mihi et populo cautum sit sine vecturæ periculo.*" From this passage it is inferred that *Cicero* alludes to an insurance. I own, from the meaning of the word *prædes*, and from the situation of affairs at *Rome*, it seems as if *Cicero* wished rather to find some secure and substantial person at *Laodicea*, in whose care and custody he might leave this money till more peaceable times; and it is very unlikely that in such a troublesome conjuncture he should be desirous of bringing a great treasure to the scene of faction and confusion, especially as, in a letter to his friend *Atticus*, he declares himself at a great loss to know what line of conduct he ought to pursue. But even if he wished to bring it to *Rome*, the mode he proposed seems more like the modern bill of exchange, than a policy of insurance. (*b*) Besides, unless this species of

Epistolæ ad Familiares, lib. 2. epist. 17.

Ferguson's Hist. of the Rom. Rep. b. 4. c. 5.

Cicero ad Atticum, lib. 7. epist. 1.

(*a*) It has been truly observed by Mr. Millar, that in these instances from the Roman historians, no mention is made of a premium paid by the merchant for the hazard undertaken; and that they are rather to be considered as examples of a bounty offered by the public, than of a mutual contract.

Millar on Insurances.

(*b*) Since I published the first edition of this work, I have looked into Melmoth's translation of Cicero's Epistles; and I am happy

of contract was at that time tolerably well understood, *Sallust*, the person to whom he wrote, would have found considerable difficulty in comprehending his meaning from the single sentence in his letter which has been mentioned; and if it were well known, is it possible to suppose it would not have obtained a place in their code of laws?

Molloy, Malyne. But the passage upon which those, who contend for the antiquity of this branch of commerce, have chiefly relied, is one to be found in *Suetonius*, in the eighteenth chapter of his life of *Tiberius Claudius*, the fifth emperor of *Rome*. "*Negotiatoribus certa* "*lucra proposuit, suscepto in se damno, si cui quid per* "*tempestates accidisset.*" This sentence wholly unconnected seems to convey such an idea; but we must attend to the context in order to understand it. This relates merely to the corn trade; for as the *Roman* territory was not sufficient to supply enough for the consumption of the city, it became absolutely necessary to give great encouragement to this branch of commerce: nay it was a political, not a mercantile concern, for the very existence of the empire depended upon it. It was this circumstance which induced the emperor to pay such regard to this branch of trade, to propose bounties, and to confer certain privileges, the *certa lucra*, of which *Suetonius* speaks, upon those who would venture out to sea for the public service in the midst of winter. Dr. *Taylor* tells us, Civil Law p. 499.

to find that, without knowing I had such an authority, I have put the same sense upon this passage which that elegant translator had done before me. The whole sentence is translated thus: "I pur-"pose to leave the money at Laodicea, which shall arise from the "sale of those spoils, and *to take security* for its being paid in "Rome: in order to avoid the hazard both to myself and the "commonwealth of conveying it in specie."

us, that a private consideration also had some weight with *Claudius* upon this occasion; for that once, in a great scarcity of provisions, he was attacked in the forum by the populace, and so disagreeably treated with abuse, and crusts of stale bread, that he with great difficulty escaped through some private passage; from which time he made it his great care and concern to get corn imported, even in the winter. As to the risk which *Suetonius* says the emperor took upon himself, it is to be observed, that although the ships were private property, yet they would not have gone to sea in the dangerous season they did, had it not been for the public service, and to provide provisions for the use of the whole city. This being the case, we have already shewn, that it would be contrary to the first principles of justice and equity, and to the practice followed at this day by all governments which are founded on just principles, to allow such losses to fall upon individuals. (*a*) From what has been said it appears evident, that the *Romans* had no knowledge of insurances; in addition to which both *Grotius* and *Bynkershoek* have expressly declared, that among the ancients this contract was unknown; the latter of whom uses these expressions: "*Adeo* "*tamen ille contractus olim fuit incognitus, ut nec* "*nomen ejus, nec rem ipsam in jure Romano depre*-"*hendas.*" (*b*)

Grotius de Jure Belli, lib. 2. c. 12, s. 3. Bynk. quæst. Juris Publici, lib. 1. cap. 21.

But

(*a*) The observations here made seem, upon examination, to be agreeable to the ideas of Dr. Taylor, the president Montesquieu, and Mr. Schomberg, upon the same subject. See also the opinion of a learned civilian, Langenbeck of Hamburg, in Magen's Essay on Insurances. Vol. i. p. 1.

(*b*) By a late work of M. De Pauw, intitled, Recherches Philosophiques sur les Grecs, it is manifest that the Athenians were well acquainted with the nature of bills of exchange; and this learned foreigner seems to think it a matter of uncertainty whether the insurance of ships was ever practised among them: but he says it is

 clear

But to whatever degree of excellence the *Romans* attained either in literature, commerce, or any of the refined arts, they all visibly declined when the *Roman* empire was overrun by the barbarians; or, perhaps it may be said with greater propriety, that they were overwhelmed and lost with that power which had raised them to be the object of public attention and notice. For in times of public ruin and desolation, when war rears its standard, lays waste cities, and tramples on the noblest improvements, it is impossible for commerce to hold its station, or to flourish in the midst of contention and tumult.

Hume. It is the observation of a profound modern historian, that there is an ultimate point of depression, as well as of exaltation, from which human affairs naturally return in a contrary progress, and beyond which they seldom pass in their advancement or decline. This was the case with respect to commerce. When the repeated incursions of the Barbarians had ravaged the *Roman* empire, and had checked every liberal improvement, some people forced by necessity, or led by inclination, took shelter in a few marshy islands

clear that barratry was not unknown to them. I am inclined, however, to think with Grotius and Bynkershoek, that this contract was as much unknown to that great people as to the rest of the ancient world. If this had not been the case, can it be supposed that we should find no trace of it in their history, the speeches of their orators, or their laws? Is it not as likely to have been mentioned, as bills of exchange; and particularly when barratry was mentioned, if this contract had had an existence, would it not have been stated on whom the loss was to fall? Besides, the instance given of barratry by M. De Pauw is not what we call barratry in England: for the case put is a case of fraud committed by the owners, who, by the law of England, cannot commit barratry, *which is a criminal act of the captain, to the prejudice of his owners, and without their privity or consent.*

that

that lay near the coast of *Italy*, and which would never have been thought worth inhabiting in time of peace. This happened in the sixth century; and at the first settling of these wanderers, they had certainly no other object in view, than that of living in a tolerable degree of security from their enemies, and of procuring a moderate subsistence. As these islands were divided from each other by narrow channels, and those channels were so encumbered by shallows, that it was impossible for strangers to navigate them, they found that security which they wished; and by uniting among themselves for the sake of improving their condition, they became in the eighth century a well established republic. This, though it may appear strange, was the origin of the famous republic of *Venice*, which soon became a great commercial power; for, from the first moment that those people took possession of the islands, necessity made them extremely attentive to commerce; the first beginning of which was naturally fishing. Next to fishing, they began to trade in salt, many pits of which were discovered in their own islands; and at last their city gradually became the magazine for the merchandize of the neighbouring continent on all sides, and they themselves the general carriers of *Europe*. Thus to the people of *Italy*, and to those of *Venice* and *Genoa* in particular, we are to attribute the re-establishment of commerce. Of the causes which contributed to its revival, it remains to speak.

Anderson's History of Commerce, fol. vol. i. p. 19, 20.

Various causes concurred to revive the spirit of commerce, and to renew, in some degree, that intercourse between nations, which during the period of *Gothic* ignorance and barbarity, had been much interrupted. The religious wars of the eleventh century, called the Crusades, by leading many from every part

of *Europe* into *Asia*, opened an extensive communication between the East and West; and though the avowed purpose of these expeditions was conquest, and not commerce; though the issue of them proved as unfortunate, as the motives for undertaking them were wild and enthusiastic, yet their commercial effects were beneficial and lasting. For the first armies, which ranged themselves under the banner of the Cross, having been led through a vast extent of country, and having suffered so much from the length of their march, and the barbarism and inhospitality of the people inhabiting those countries through which they travelled, others were deterred from taking the same course, and chose rather to go by sea, than encounter so many hardships. *Venice*, *Genoa*, and *Pisa*, furnished the transports to convey the troops: and it is reported, that the sums were immense which they received merely for freight. Besides this, the Crusaders contracted with them for supplies of military stores and provisions; their fleets hovered on the coast; and by supplying the army with whatever was wanting, they engrossed all the advantages arising from this branch of commerce. These states were also benefited by the success which attended the arms of these religious and enthusiastic heroes; for there are charters yet extant, containing grants to the *Venetians*, *Pisans*, and *Genoese*, of great privileges in the various settlements which the Christains had gained in *Asia*. When the Crusaders seized *Constantinople*, the *Venetians*, who had planned the enterprize, transferred to their own state many of the valuable branches of commerce, which had formerly centered in *Constantinople*. Another great cause of the revival of commerce, was the invention of the Mariner's Compass, which, by rendering navigation more secure as well as more adventurous, facilitated the communications

Robertson's View of Society, &c.

nications between remote nations, and brought them nearer to each other. The honour of this invention, so beneficial to mankind, has been claimed by the *French*; and their claim has been allowed by several authors, and maintained by a celebrated writer of their own. In this opinion perhaps national partiality may have some weight. Most authors, however, agree that the inventor was *Flavio de Gioia*, a native of *Amalfi*, an ancient commercial city in the kingdom of *Naples*. (*a*)

Huet Traité du Commerce des Anciens, cap. 10. Anders. Hist. of Commerce, fol. edit. vol. 1. p. 144.

It is evident, that almost all the commerce of *Europe*, in those days, centered amongst the *Italians*. As they at that time carried on and established a regular trade with the East in the ports of *Egypt*, and drew from thence all the rich produce of *India*; it is reasonable to suppose, that in order to support so extensive a commerce, these industrious and ingenious people were the first who introduced insurances into the system of mercantile affairs. It is true, there is no direct authority to warrant a positive assertion, that they were the inventors of this kind of contract: but it is certain, that the knowledge of it came with them into the different maritime states, in which parties of them settled: and when it is admitted that they were the carriers, manufacturers, and bankers of *Europe*, it is probable that they also led the way to the establishment of a contract, which is so essentially necessary to the support and cultivation of commerce. It has, however, been asserted by writers of the *French* nation,

(*a*) It appears from Anderson, that some people had supposed that the conquests of Charlemagne in Italy, towards the end of the 8th century, and his subsequent establishment of Christianity in the western and northern parts of Germany, contributed greatly to the revival of commerce. In what I have said upon this subject, I chose rather to follow the steps of a very elegant and profound historian of modern times. Robertson's View of Society, &c.

Anderson's Introd. fol. edit. p. 7.

Mons. Savary Dict. Univ. Le Guidon, c. 1. art. 1

tion (*a*), that insurance dates its origin in the year 1182, and that it was introduced by the *Jews*, who were banished from *France* about that period, and who took that method to facilitate and secure the removal of their effects. They proceed to say, that the *Lombards*, who were not idle spectators of this contrivance, adopted it, and in a short time improved it considerably. It is not very necessary to enquire into the truth of this fact, nor indeed are there materials to enable us to do so: but it is observable that the President *Montesquieu* mentions that the *Jews* upon this occasion invented bills of exchange; but does not say a syllable of policies of insurance. It is agreed, however, that if the *Lombards* were not the inventors, they were at least the first who brought the contract of insurance to perfection, and introduced it to the world. (*b*)

Esprit des Loix, liv. 21 c. 16.

Before we come to consider the amazing improvements which have taken place, with respect to this branch of commerce, in our own country, in these days, it will be expected that some notice should be taken of those maritime codes, and naval regulations, which have distinguished the modern, no less than the laws of *Rhodes* did the ancient world.

To the people of *Amalfi* we are indebted as well for the first code of modern sea laws, as for the in-

(*a*) Anderson says, the Jews were banished from France in 1143. Anderson's History of Commerce, vol. i. p. 82. But I believe such an event twice took place in that kingdom.

(*b*) I am aware that several learned men are of opinion, that insurances were of an earlier date than is here ascribed to them. On a subject where so much obscurity must necessarily exist, I am by no means tenacious of my opinion; but the inclination of my mind is to adhere to the idea that the Lombards were the inventors. See also Mr. Millar's Introduction.

vention

vention of the compass. We learn from *Anderson*, that the city of *Amalfi*, so long ago as the year 1020, was so famous for its merchants and ships, that its inhabitants at that time obtained from the Caliph of *Egypt* a safe conduct, to enable them to trade freely in all his dominions; and they also received from him several other distinguished privileges. It was towards the close of that century, that they promulgated their system of marine law, which, from the place of its compilation, received the denomination of *Tabula Amalfitana*. This table superseded in a great measure the ancient *Jus Rhodianum*; and its authority was acknowledged by all the states of *Italy*, for some centuries. But as trade increased very rapidly in other cities on the coast of the *Mediterranean* sea, they became unwilling to receive laws from a neighbouring state, which they now equalled, if not surpassed, in the extent of their naval establishments. Every one, therefore, began to erect a tribunal, in order to decide all controverted points, according to laws peculiar to itself; but still referring, in matters of higher moment, to the former rule of action, the *Amalfitan* code. From such a variety of laws, as must necessarily be the consequence of each of the *Italian* states becoming its own legislator, so much disorder and confusion arose, that general convenience at last compelled them to do that, which jealousy of each others power and growing commerce would for ever have prevented them from effecting; and at a general assembly it was agreed to digest the laws of all the separate communities into one body. Every regulation, therefore, which was thought to be founded in justice either in the laws of *Marseilles*, *Pisa*, *Genoa*, *Venice*, or *Barcelona*, was collected into one mass, and published in the 14th century, under the title of *Consolato del Mare*. A *French* writer, *Sur la*

Vol. i. p. 58.

Hubner.

la Saisie des Batimens neutres, speaks of this production in a very unfavourable way; and calls it a rude ill-formed mass of maritime and positive regulations, of ordinances of the middle ages, and of private decisions. Indeed when we consider that this was a compilation from the various regulations of so many different states, it could not excite much surprise, if it really merited the censure of this author. But upon examination it is a work of considerable merit; the decisions it contains are founded on the laws of nations; it has been received and allowed to have the force of law in every part of *Italy*; and it is the source from whence the people of that country, as well as those of *Spain* and *France*, have been said to derive many of their best marine regulations. Unfortunately too, *Emerigon* has discovered, that because one of the chapters in the *Consolato del Mare* overturns some favourite system of this learned author, he is out of humour with the whole composition. One thing, however, is clear, that neither the *Consolato del Mare*, nor the *Amalfitan* code, upon which it is founded, contains any thing upon insurance law, so that we have here another confirmation of the idea, that this contract was not a production of very ancient times. (*a*)

Vinnius in Peckium, 190.

Emerigon, preface, p. 8.

The spirit of commerce was not, however, confined to the South parts of *Europe*; it now began to extend itself among the inhabitants of the Western coasts. But whatever maritime regulations they might have established among themselves, they were found not to be sufficiently extensive for the commercial intercourse which began to take place in those

(*a*) In what I have said upon the Amalfitan code, I have found myself extremely indebted to Mr. Schomberg's very ingenious observations upon that subject, in his treatise on the maritime laws of Rhodes.

countries in the course of the 12th century. Accordingly, about the year 1194, *Richard* the First, King of *England*, on his return from his wild expedition to the *Holy Land*, having staid to repose himself for some time at the isle of *Oleron*, in the *Bay* of *Biscay*, an island which he inherited in right of his mother, whose portion it was in marriage with his father *Henry* the Second, gave orders for the compilation of a maritime code. Some authors suppose that the hardships and dangers, to which, in the course of his expedition, he saw adventurers by sea were exposed, induced him to promulgate a law, by which their condition might be rendered more comfortable. Others imagine, and probably their supposition is better founded, that the great intercourse between his *English* and *French* subjects, and their allies, required a certain general system of sea law, for the more speedy and impartial determination of all disputes which might occasionally arise. The laws of *Oleron*, therefore, which are in substance but an abstract of the old *Rhodian* laws, with some additions and alterations, accommodated to the practice of that age, and the customs of the Western nations, were proposed as a common standard and measure for the more equal distribution of justice among the people of different governments. These excellent regulations were so much esteemed, that they have been the model on which all modern sea laws have been founded; and two distinguished nations have contended for the honour of their production. *France*, jealous of the lustre which the *English* justly derived from the production of this code, with much anxiety claims this honour to herself; and very distinguished authors have stood forth the champions of her claim. The substance of their argument is, that *Eleanor*, wife of *Henry* the Second, King of *England*, and Duchess

Schomberg's Observ. on the Rhodian Laws.

Sir Philip Meadow's Observ. on the Dom. of the Sea, c. 4.

Cleirac Coutumes de la Mer. p. 2. Valin. Emerigon.

Duchess of *Guyenne*, returning from the *Holy Land*, and having seen the beneficial effects of the *Consolato del Mare*, ordered the first draught of the judgments or laws of *Oleron* to be made: *that her son Richard the First, returning from the same expedition, enlarged and improved* what his mother had begun: that they were certainly intended for the use of the *French* merely, because they were written in the old *Gascon French*, without any mixture of the *Norman* or *English* languages: that they constantly refer for examples of voyages to *Bourdeaux*, *St. Malo*, and other sea-ports in *France*; never to the *Thames*, or to any port of *England* or *Ireland*: and that they were made by a Duchess and Duke of *Guyenne*, for *Guyenne*, and not for their kingdom of *England*. One of these learned writers adds a reason, which he thinks very conclusive, to prove that these laws were of *French* extraction; namely, that from their first appearance, their decisions have been treated with extreme respect in the courts of *France*.

Valin.

In these days, it is very immaterial whether *France* or *England* is entitled to the honour they respectively claim, and I shall not tire the reader with any argument upon the point. (*a*)

Vol. i. p. 454.

Anderson in his history of commerce has expressly stated, but he does not adduce any authority in support of his opinion, that the laws of *Oleron* treat of insurances. I have read them repeatedly with the direct view of discovering whether insurances were of so ancient a date: but I have not found a single word

(*a*) For the arguments in favour of the English claim, the reader may consult Selden's Mare Clausum, lib. 2. cap. 24. Mr. Justice Blackstone's Commentaries, vol. i. page 418. Schomberg's Observations, page 88.

which

which could induce me to subscribe to such an assertion. In confirmation of my opinion, *Emerigon*, speaking of these laws, has observed, "*Il n'y est pas* "*dit le mot du contrat d'Assurance, qui apparemment* "*n'etoit pas encore alors en usage.*" Preface, p. 11.

But while we pay due respect and veneration to those maritime regulations, which distinguished the Southern and Western parts of *Europe*, it would be improper silently to pass over the laws, which were ordained by an industrious and respectable body of people, who inhabited the city of *Wisbuy*, famous for its commerce, and renowned on the shores of the *Baltic*. The merchants of this city carried on so extensive a trade, and gave themselves up so entirely to commerce, that they must doubtless have found a great inconvenience in having no maritime code, to which they could refer to decide their disputes. To such a cause we are probably indebted for those laws and marine ordinances, which bear the name of *Wisbuy*, which were received by the *Swedes*, at the time they were composed, as a just and equitable rule of action, and which were long respected (and for aught I know, are to this day observed) by the *Germans*, *Swedes*, *Danes*, and by all the Northern nations; although the city in which they received their origin, has long dwindled into insignificancy and contempt. At what time these laws were compiled is a matter of dispute; and different writers have adopted different periods, in order to answer their own particular ends, or to advance the honour of that age which it happened to be their business to extol. The writers of the North pretend that *Wisbuy* was a great commercial city, in the 9th century; from whence they argue, that their laws must be of very high antiquity; that they were the model, from which those of

Cleirac Us et Coutumes de la Mer. Emerigon, Pref.

of *Oleron* were copied, and that they were received and acknowledged by all nations in *Europe*, even to the Straits of *Gibraltar*. On the other hand it is answered, and with much strength of reasoning, that the Northern code is a transcript from that of *Oleron*, although it contains several additions: for it has been shewn, that the laws of *Oleron* were promulgated by *Richard* the First about the close of the twelfth century, at which time, as appears by the report of a *Swedish* historian, the city of *Wisbuy* was not built, nor for near a century afterwards; that the inhabitants were merely strangers collected together from different parts, who, so far from having any power or influence over their neighbours, were not absolute masters of their own city. Besides, if their laws had been prior to those of *Oleron*, we should have found in the latter some regulations respecting insurances; because a copyist never would have omitted so material a branch of commercial legislation, the laws of *Wisbuy* having expressly mentioned insurances, and provided, that if the merchant obliged the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea.

Cleirac, 4.

Olaus Magnus, lib. 10. cap. 16.

Art. 66.

Afterwards, towards the close of the fifteenth century, we find from history, that many considerable regulations were made at *Barcelona* in *Spain*, respecting marine insurances.

Robertson's View, vol. 1. p. 351. quarto edit. Emerigon, pref. p. 12.

But if the laws of *Wisbuy* were not prior to those of *Oleron*, yet it is much to their honour, and shews in what estimation they were held in the greatest part of *Europe*, that after having for a long course of time enjoyed the highest authority in all the Northern tribunals for maritime affairs, they were thought worthy of

of being adopted as the basis of the ordinances of the *Hanseatick* league. Of this ancient and famous confederacy it will be sufficient in this place to observe, that it began about the thirteenth century, and originated with the cities of *Lubeck* and *Hamburgh*, which were obliged to enter into a league of mutual defence, in order to protect themselves against the nations round the *Baltick*, who were extremely barbarous, and infested that sea with their piracies. These two cities derived such advantages from their union, that other towns acceded to the confederacy, and in a short time, eighty of the most considerable cities, scattered through those countries, which stretch from the bottom of the *Baltick* to *Cologne* upon the *Rhine*, joined in the famous *Hanseatick League;* which became so formidable, that its alliance was courted, and its enmity dreaded by the most powerful monarchs. This association, it is said, formed the first systematic plan of commerce known in *Europe:* but notwithstanding this, they did not for a long time publish any maritime code, but were entirely governed by those of *Oleron* and *Wisbuy*. At a general meeting, however, held at *Lubeck* in the year 1614, it was agreed to extract from those compilations whatever should be thought most useful, and that it should in future be the rule of decision in every contested point. It was prior to this time, about the fourteenth century, that the members of this league were in their greatest splendour; their commerce was at its height; they supplied the rest of *Europe* with naval stores, and they pitched upon different towns, the most eminent of which was *Bruges* in *Flanders*, where they established staples, in which their commerce was regularly carried on. The sovereigns of *Europe* looked up to the *Hanseatick League* with esteem and admiration, and the kings

Schomb. Observ. 106.

Robertson's View of Society.

Kuricke Comm. Schomb. Observ.

Robertson's View, &c. Ander. Hist. of Comm.

kings of *France* and *England* granted them considerable privileges. But when this union had rendered them rich and powerful, they grew arrogant and overbearing, which induced the princes, whom they had offended, to take a closer and more accurate view of the danger which might arise from such a conspiracy, and of the advantages which might accrue to themselves from the possession of their trade. These causes at last concurred to effect the decay of this alliance, which however is not wholly dissolved at this day; as the cities of *Lubeck*, *Hamburgh*, and *Bremen*, maintain sufficient marks of that splendour and dignity with which this confederacy was anciently distinguished.

Hume's Hist. of England, vol. iv. p. 348, 349.

Having thus taken a brief but comprehensive view of the most considerable maritime states both of ancient and modern times, I forbear to go more at length into the history of several governments, which have published naval regulations for the direction of their own subjects; because they are only binding within their own particular districts: they are very similar to those about which so much has been already said; they are all collected by *Magens* in the second volume of his Essay on Insurances, and are occasionally referred to in the course of the ensuing work. Besides, I hasten to give an account of the vast improvements which have been made in this country within these last thirty years (*a*), with respect to insurances, and which are the main object of this enquiry. It would, however, be improper, in a work of this nature, entirely to pass over the *French* nation, the maritime strength of which has of late years considerably increased; and whose writers upon commercial affairs would reflect honour upon any country.

(*a*) This was originally written in 1786.

Few

(*a*) Few people understand the theory of commerce better than our neighbours on the Continent; and yet they have not in practice come up to what might have been expected. It is true that *France* from her situation, from the bent of her people to certain manufactures, from the happiness of her soil, and her natural advantages, must be always possessed of a great internal and external trade, which must add greatly to her wealth, and render her the most respectable power on the Continent of *Europe*. But the *French* do not naturally possess that undaunted perseverance, which is necessary for commerce and colonization. It is besides a great disadvantage to the commerce of *France*, that as its government is military, the profession of a merchant is not so honourable as in *England*, so that the *French* nobility think that it would be beneath them to attend to the drudgery of trade, and that it would degrade their ancestry to allow any of their sons to follow the business of a merchant. The consequence of this is, that the church, the law, and the army, are stocked with the members of noble families; and the counting-house is by them entirely deserted. At one period, indeed, there was an appearance that *France* would make as illustrious a figure amidst the powers of *Europe* in trade, as she then did as a warlike nation. The period, to which I allude, was under the administration of the famous *Colbert*, who, next to *Henry* the Great, may justly be styled the father of the *French* commerce and manufactures. This illustrious man, who was of *Scotch* extraction, descended of a family no way considerable by its splendour or antiquity, raised himself by his activity, diligence, and

Vie de Colbert.

(*a*) It is hardly necessary to mention, that these observations were originally written long before any change had taken place, or been attempted, in the government of France.

knowledge of commerce, to the first offices under the government of *France*. Being appointed to the superintendance of the finances, he proposed such regulations as brought about the purpose he intended, the orderly and frugal management of them; and established the trade of *France* with the *East* and *West Indies*, from which she has reaped considerable benefits. He also patronized and encouraged the liberal arts and sciences, reformed the courts of justice, and introduced many important regulations, which regarded the order of society. But in 1669, when appointed secretary of state, and intrusted with the management of affairs relating to the sea, he had a full opportunity of exerting those talents, which he so eminently possessed, and for the exertions of which his name has been transmitted with so much honour to posterity. In order to gain a proper insight into the true effects of commerce upon the various nations of the world, and the advantages of some particular branches of trade, he procured and employed learned and diligent men to enquire into the commercial histories of cities long since destroyed, and the nature of the climate, soil, and productions of the countries then rising into notice. It was to this spirit of enquiry in this famous statesman, that the world is indebted, as appears from the dedication, for that very masterly performance upon the commerce and navigation of the ancients, written by *Huet*, bishop of *Avranches* and *Soissons*, who is justly entitled to a high rank among men of letters. *Colbert* having thus made use of the labours of others, in order to gain useful information, undertook to restore the navy and commerce of *France*; and he completed all his services by the publication of that excellent body of sea laws, known by the name of the Ordinances of *Lewis* the 14th, which comprehend every thing relating to naval or commercial jurisprudence; and

Huet Hist. du Commerce et de la Navigation des Anciens, pref.

Vie de Colbert.

and of which the doctrine of insurances forms a considerable part. To its merit all *Europe* has borne testimony; and the name of *Colbert* must ever be mentioned with respect, when the ordinances of *Lewis* the 14th are the subject of conversation. (*a*)

These ordinances have had the good fortune to meet with a laborious commentator in *Valin*, who, being thoroughly sensible of the advantages which his country must necessarily derive from such an excellent code, has, with a degree of labour and industry which excite our admiration, and which are highly deserving of imitation, placed it in the most favourable point of view, has cleared up every obscurity, by tracing these laws to their ancient sources, and by a full investigation of old ordinances, and the decisions of former tribunals, has added much to the mass of learning upon subjects of this nature. But of all the sources, from which modern *French* legislators could derive the most essential information, the famous treatise called "*Le Guidon*" was the chief. This tract was republished by *Cleirac*, who pays a due compliment to its merits, in his work upon the Usages and Customs of the Sea: and although in its style and manner it certainly savours of the rust of antiquity, yet it contains the true principles of naval jurisprudence. If the style be antiquated, and the text be corrupted in some places, yet the treatise is still valuable by the wisdom which shines through the

Cleirac, p. 213.

(*a*) It was under the administration of Colbert, that the French laid the foundation of Quebec, on the banks of the river St. Lawrence; and he performed a work, which, says a French historian, even in the eyes of Richelieu, seemed to surpass human power; and that was to effect a junction between the Atlantic and the Mediterranean, by means of a canal, the execution of which attracted the admiration of Europe, and added much to the splendour of French commerce.

L'Honneur François, par M. de Sacy, tom. 7 p. 302.

 whole,

whole, and the number of decisions which it contains.

Upon this occasion let me not forget to take proper notice of two very modern and distinguished *French* writers, M. *Pothier* and M. *Emerigon*. The former of these has written admirable dissertations upon every species of express and implied contracts, and amongst the rest upon that of insurance; he has considered his various subjects with so much clearness and perspicuity, and has produced so many apposite examples in support of the positions he advances, that they greatly contribute to the advancement of the knowledge of this branch of jurisprudence. His style is at the same time manly, neat, and classical; and well suited to didactic discourses. (*a*)

Pothier, 3 tom. quarto, p. 1.

Traité des Assurances.

M. *Emerigon* has, in his work, confined himself to the consideration of marine insurances, and to the contract of bottomry only. This being the case, he has gone into those subjects much more at length than any former *French* writer; and has, with infinite labour, unwearied study and reflection, collected the decisions and authorities applicable to the purpose of his work. This learned foreigner, I understand, holds a distinguished rank among the advocates of his own country: and his treatise upon insurances will by no means diminish his fame.

We have seen, that the naval reputation of the *English* was arrived at a great height in the twelfth

(*a*) The attention of English lawyers was first drawn towards the works of this eminent judge, by that distinguished luminary of our own country, Sir W. Jones, in his treatise on the Law of Bailments; and we have now an opportunity of perusing, in an English dress, Pothier's Treatise on the Law of Obligations, well translated, and accompanied by several very learned notes, illustrative of the English law on the subject, by W. D. Evans, Esq.

century,

century, for the laws of *Oleron*, of the merits of which much has been said, were at that time compiled by an *English* monarch, and received here as the regulator of naval affairs. The progress of commerce, however, in this country, was not answerable to so auspicious a beginning; for in the reign of *Edward* the Third, upwards of a century afterwards, commerce and industry were at a very low ebb. That monarch, struck with the flourishing state of the Northern provinces, which have been already described, and perceiving the true cause of their prosperity, endeavoured to excite a spirit of industry among his subjects, who seemed to be blind to the advantages of their situation, and ignorant of those sources, from which they might derive wealth and opulence. So far were they lulled by ignorance and indolence, that they did not even attempt those manufactories, the materials of which they themselves supplied to foreigners. Notwithstanding the endeavours of *Edward*, and the many wise establishments proposed and encouraged by him, it was not till the reign of *Elizabeth* that the *English* began to discover their true interests, and the arts by which they were to obtain that pre-eminence and rank, which they now hold among commercial nations. This slow progress of commerce in this country may be accounted for on various grounds. During the *Saxon* heptarchy, *England* was split into many kingdoms, perpetually at variance with each other; it was exposed to the fierce incursions of the Northern pirates; it was sunk in barbarity and ignorance; and consequently was in no condition to cultivate commerce, or to pursue any system of wise or useful policy. To this succeeded the *Norman* conquest, and all the consequences of a feudal government, military in its nature, hostile to commerce, and the arts and refinements of a liberal and civilized people. Scarce had

Hume's Hist. of Eng. oct. edit. vol. ii. p. 494.

Robertson's View of Society, &c.

 the

the nation recovered from the shock occasioned by this revolution, when it was engaged in supporting its monarch's pretensions to the *French* crown, and it long continued to waste its vigour and wealth in wild endeavours to conquer that country. To this we may add the destructive civil wars between the houses of *York* and *Lancaster*, which long deluged the kingdom with blood: and to which a period was at last happily put by the union of their several titles to the crown in the person of *Henry* the Eighth. The reformation then took place under that monarch, and it was not till the reign of *Elizabeth*, that the feuds and dissensions which such an important event was likely to occasion, began to subside. During her long reign, and her wise and prudent administration of government, commerce began to rear its head, and found shelter and protection from the managers of public affairs. From this short sketch, it is not much to be wondered at, that *England* was one of the last nations of *Europe* which availed herself of her great commercial advantages: but she has since made ample amends for her long continued indolence and inactivity, by the amazing extent of her commerce, and the wise laws and regulations to be found in her system of maritime jurisprudence.

While commerce continued in this weak and languid state, it cannot be supposed that insurances, which spring from commerce, were at all encouraged or understood. It is true, that the *Lombards* came into *England* in the 13th century, and it is universally agreed, that whatever may have been the origin of insurances, they were introduced into *England* by that active and industrious people. This idea is countenanced and confirmed by the clause to this day inserted in all policies of insurance, "that this writ-"ing or policy of assurance shall be of as much "force and effect as any writing heretofore made in "*Lombard*

1 Anderson's Hist. of Com.

Vide the Appendix, No. 1.

" *Lombard Street*, &c." the place where these *Italians* are known to have taken up their residence, and carried on their trade. The preamble to the statute of Queen *Elizabeth*, which will be presently mentioned, speaks of insurances as having existed time out of mind in this kingdom. Be this as it may, it is certain that prior to the reign of that princess very few insurances had been effected; or, if effected, no question had ever arisen upon them in any of the superior courts. So little were the judges acquainted with the nature of the contract, that so late as the 30th and 31st of *Elizabeth's* reign, it became a question where an action upon a policy of insurance should be tried, the policy having been effected in *London*, and the ship detained in the river *Soane* in *France*. The policy was on a ship from *Melcombe Regis*, in the county of *Dorset*, to *Abbeville* in *France*. The plaintiff declared, that the ship, in sailing towards *Abbeville, to wit*, in the river of *Soane*, was arrested by the King of *France*. The parties came to issue upon the question, whether the ship was so arrested or not: and it was tried before Lord Chief Justice *Wray*, in the city of *London*; and a verdict was found for the plaintiff. In arrest of judgment it was moved, that this issue, arising merely from a place *out of the realm*, could not be tried in *London*. But it was resolved by the court, that this issue should be tried where the action was in this case brought: for the promise, which is the ground and foundation of the action, was made in *London*; and the arrest now in issue is not the ground of the action which is founded on the *assumpsit*, and the arrest is the breach of the *assumpsit*.

6 Coke, Rep. 47. b.

This is the most ancient case I have been able to find upon the subject of insurances; and I thought proper to insert it here, as the best proof that, prior

to the reign of *Elizabeth*, this contract could have been very little, if at all, known. We have seen, however, that under *Elizabeth*, the genius of *England* began to display itself: about which time, also, the legislature began to think the regulation of matters of assurance an object well worthy their most serious attention; and it cannot but afford us much pleasure to find, that even in that early age the true principles upon which this species of contract is founded, and upon which it ought to be protected and encouraged in a commercial nation, were clearly and fully understood. In the preamble to an act of parliament, passed in the 43d year of the reign of Queen *Elizabeth*, "*concerning matters of assurance used amongst* "*merchants*," the sense of the legislature upon the subject is expressed with clearness and perspicuity. After reciting, that it has ever been the policy of this nation to encourage trade, and that policies of assurance have existed time out of mind, it goes on to state the advantages to be derived from their encouragement in a commercial nation. "By means "of which policies of assurance, it cometh to pass, "upon the loss or perishing of any ship, there fol- "loweth not the undoing of any man, but the loss "lighteth rather easily upon many, than heavy upon "few, and rather upon them that adventure not, "than upon those who do adventure, whereby all "merchants, especially those of the younger sort, "are allured to venture more willingly, and more "freely."

43 Eliz. ch. 12

The purpose of that statute was, to erect a particular court for the trial of causes, relative to policies of insurance, in a summary way; and to that end the statute ordained, that a commission should issue yearly, directed to the Judge of the *Admiralty*, the Recorder of *London*, two doctors of the civil law, two common lawyers, and eight merchants, empowering

any

any five of them to hear and determine all such causes, arising in *London;* and it also gave an appeal from their decision, by way of bill, to the Court of Chancery. But this statute not entirely answering the intention of the legislature, some further regulations were made by a subsequent statute: such as the reduction of the number necessary to constitute a quorum. I forbear entering at length into this matter, the court erected by these statutes being now entirely disused. The reasons of this may be collected from some few decisions in our reporters: but one appears on the face of the statute itself; namely, that its jurisdiction was not sufficiently extensive, being confined to such causes only *as arose in London.*

13 and 14 Car. 2. ch. 23.

By a case reported in *Style,* we find, that a prohibition issued to the court of policies of insurance, to prevent it from proceeding in a case of insurance upon a life, the Court of King's Bench being of opinion, that the statute meant to give the court below cognizance of such *contracts* only as related to *merchandize.*

Bendir v. Oyle, Style, 166.

In another case it seemed to be the opinion of the Court of King's Bench, that the jurisdiction of this newly erected court did not extend to suits brought by the assurer against the assured; but only to such as were prosecuted by the latter against the former. It is true, in Sir *Bartholomew Shower*'s note of the case, no decision appears to have been made; but a rule to shew cause why a prohibition should not issue was obtained; and no notice is afterwards taken of it, although the learned reporter was himself the counsel in the cause, who had obtained the original rule.

Dalbie v. Proudfoot, 1 Shower, 396.

But a case reported in *Siderfin,* seems to have struck a more severe blow at the existence of this court than any of those cases I have mentioned; for it was there held,

Came v. Mov. 2 Siderfin

held, that it was no bar to an action upon a Policy of Insurance at the common law to say, that the plaintiff had sued the defendant for the same cause in the court erected by the statute of *Elizabeth*, and that his suit was there dismissed.

Lex Merc. Red. 4th edit. p. 292. These causes co-operating, together probably with some instances of partiality in the Judges, this court fell into disuse, no commission having issued for many years; but insurance causes are now decided, like all other questions of property, and by that mode of trial most agreeable to the nature of our constitution, by a trial in a court of common law.

It has been much the fashion of late years to insist upon the advantages, which the trading part of the nation would derive, from the establishment of some equitable and amicable judicatory for the trial of all disputed points in matters of insurance. This is only another proof of the weakness and fallability of the human mind, which is never satisfied with the enjoyments within its reach, however excellent they may be; but pants after those of foreign growth. Thus, a people who are possessed of a species of trial, the best calculated for the discovery of truth, and the advancement of justice, and which has excited the admiration of the world, are desirous of parting with such an advantage for a mode of trial, which is very unsatisfactory.

The court erected by the statute of *Elizabeth*, and which has now fallen into disuse, is perhaps one of the strongest arguments, that can be adduced to prove, that such a judicature is not congenial to the spirit and dispositions of *Britons*, nor well adapted for the purposes of its institution. It is universally agreed by all writers upon jurisprudence, that nothing tends so much to the elucidation of truth, and the detection of fraud as the open *viva voce* examination of wit-

 nesses,

nesses, in the presence of all mankind: before Judges, who, from their knowledge of books and men, acquired by long study and experience, are well qualified to discriminate and decide between right and wrong; and before twelve upright citizens, who have an opportunity of observing the appearance, countenance, inclination, and deportment of those who are thus examined upon oath. Besides the subjects of those states, which have established these equitable tribunals, sensible of the superior advantages of the *English* institution, feeling that in great mercantile questions the greatest attention is paid to the eternal and immutable principles of reason, and that all men, whether natives or foreigners, here meet with an equal measure in the administration of justice, fly to this country to make their contracts of insurance, that, in case of a dispute, they may have the benefit of its laws. Did it fall within the compass of this enquiry, I could relate many cases, of the truth of which I have not the smallest reason to doubt, which would serve to shew the idea entertained by foreigners of our mercantile jurisprudence, and the high repute and estimation in which our Judges are justly held by the *European* nations.

But though the court of Policies of Assurance has been long disused; though it is near a century since questions of this nature became chiefly the subject of common law jurisdiction; yet I am sure I rather go beyond bounds, if I assert that in all our reporters from the reign of Queen *Elizabeth*, to the year 1756, when Lord *Mansfield* became Chief Justice of the King's Bench, there are 60 cases upon matters of insurance. Even those cases which are reported, are such loose notes, mostly of trials at *Nisi Prius*, containing a short opinion of a single Judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the subject.

ject. From hence it must necessarily follow, that as there have been but few positive regulations upon insurances, the principles, on which they were founded, could never have been widely diffused, nor very generally known.

This was owing to some defects, which were discoverable in the proceedings in our courts, and in the delays and expences which suitors experienced; so that they rather chose to submit to their first loss, than be harassed by the delays of the law, or be at the expence of trying a question, of which the decision might perhaps be of less moment to the individual than to the public. These defects were so glaring, that it was one of the first acts of Lord *Mansfield's* administration to apply a remedy; and his labours have been happily attended with such success, that they have been of essential service to the nation in general, considered in a commercial light, and have excited the applause and approbation of *Europe*.

Before the time of this venerable Judge, the legal proceedings, even on contracts of insurance, were subject to great vexations and oppressions. If the underwriters refused payment, it was usual for the insured to bring a separate action against each of the underwriters on the policy, and to proceed to trial on all. The multiplicity of trials was oppressive both to the insurers and insured; and the insurers, if they had any real point to try, were put to an enormous expence, before they could obtain any decision of the question which they wished to agitate. Some underwriters, who thought they had a sound defence, and who were desirous of avoiding unnecessary costs or delay to themselves or the insured, applied to the Court of King's Bench to stay the proceedings in all the actions but one, undertaking to pay the amount of

of their subscriptions with costs, if the plaintiff should succeed in the cause which was tried; and offering to admit on their part every thing which might bring the true merits of the case before the court and jury. Reasonable as this offer was, the plaintiff, either from perverseness of disposition, or the illiberality and cunning of his advisers, refused his consent to the application. The Court did not think themselves warranted to make such a rule without his consent; but Mr. Justice *Denison* intimated that if the plaintiff persisted, against his own interest, in his right to try all the causes, the Court had the power of granting imparlances in all but one, till there was an opportunity of trying that one action. Lord *Mansfield* then stated the great advantages resulting to each party by consenting to the application which was made; and added, that if the plaintiff consented to such a rule, the defendant should undertake not to file any bill in equity for delay, nor to bring a writ of error (*a*), and should produce all books and papers that were material to the point in issue. This rule was afterwards consented to by the plaintiff, and was found so beneficial to all parties, that it is now grown into general use; and is called The Consolidation Rule. Thus on the one hand, defendants may have questions of real importance tried at a small expence; and plaintiffs are not delayed in their suits by those arts, which have too frequently been resorted to in order to evade the payment of a just demand.

2 Barnard, B. R. 103.

In former times, the whole of the case was left generally to the jury, without any minute statement from the Bench of the principles of law, on which in-

(*a*) The Court of Common Pleas were unanimously of opinion, after consideration, that a defendant who had entered into the consolidation rule could not bring a writ of error at all, although there be manifest error upon the record. Camden v. Edie, 1 H. Blac. Rep. 21.

surances

surances were established; and as the verdicts were general, it was almost impossible to determine from the reports we now see upon what grounds the case was decided. Nay, even if a doubt arose in point of law, and a case was reserved upon that doubt, it was afterwards argued in private at the chambers of the Judge who tried the cause, and by his single decision the parties were bound. Thus, whatever his opinion might be, it never was promulgated to the world: and could never be the rule of decision in any future case.

Lord *Mansfield* introduced a different mode of proceeding; for in his statement of the case to the jury, he enlarged upon the rules and principles of law, as applicable to that case; and left it to them to make the application of those principles to the facts in evidence before them. So that if a general verdict were given, the grounds, on which the jury proceeded, might be more easily ascertained. Besides, if any *real* difficulty occurred in point of law, His Lordship advised the counsel to consent to a special case. In a special case, the facts are either admitted by the parties, or if they are disputed, are proved; and then the Judge takes the opinion of the jury upon these facts, reserving the question of law to be agitated elsewhere. These cases are afterwards argued, not before the Judge in private, but in open court before all the Judges of the Bench from which the record comes. Thus nice and important questions are now not hastily and unadvisedly decided; but the parties have their case seriously considered and debated by the whole Court; the decision becomes notorious to the world; it is recorded for a precedent of law arising from the facts found, and serves as a rule to guide the opinion of future Judges. (*a*)

It

(*a*) It has been said, these special cases have destroyed the practice of special verdicts, and prevented applications by writ of error to the *dernier resort*, the House of Lords. With the multiplicity of business in

It had also been the custom, when cases were reserved, to leave it to the counsel on both sides to draw them up at their leisure. This introduced considerable delays; for every fact became again a subject of dispute; and frequently from the hurry of business and other avocations of the counsel, the case was neglected for a considerable time, before it was ready for the inspection of the Court.

Now, whenever a case is reserved, the Judge himself dictates to the clerk of the court the facts which ought to be stated, and the question upon which the opinion of the court is required: and in addition to this Lord *Mansfield*, whose rules are now the subject of our enquiry, ordered that all cases so reserved must be set down for argument within the first four days of the term following the trial; otherwise the judgment must be entered according to the finding of the jury.

One additional improvement in the proceedings remains to be mentioned. Before Lord *Mansfield*'s time, it was almost a matter of course not to decide any case, without hearing two arguments upon it: but in the very first cause which is reported of His Lordship's decisions, he expressed himself to this effect: "Where we have no doubt, we ought not to put the "parties to the delay and expence of a farther argu- "ment, nor leave other persons who may be interested "in the determination of a point of a general nature, "unnecessarily under the anxiety of suspence." When we add to these wise regulations the consider-

Raynard v. Chase, 1 Burrow, 2.

in that House, and appeals from Scotland, if writs of error had been brought in one-fourth of the special cases argued in the courts below, (supposing them to have been special verdicts,) no period of time could be predicated long enough to bring those cases to a conclusion in that House.

ation

ation that Lord *Mansfield*, during his long administration of justice, gave up a great part of his time, and employed his talents in the elucidation of those points, which tend to fix the system of mercantile jurisprudence upon the surest grounds, we need not wonder that that part of it which relates to marine insurances, has attained to its present state of perfection.

A complete system of jurisprudence cannot be suddenly erected: but there is rather matter to excite our wonder that so much has been done in this respect within the last 40 years (*a*), than ground to complain that little has been effected. It is the boast of this age, that in it the great foundations of maritime jurisprudence have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases. It will be the business of the following work, which professes to lay down a system of the law as it now stands, to point out, among other things, the improvements which have been made by the legislature from time to time on the system of insurances, by many wise statutes and salutary restrictions; and to prove, that the learned Judges of the courts both of law and equity, by their liberal and equitable construction of those statutes, and by adopting the true principles of commerce in their decision of the many intricate cases which have been brought before them, have added another pillar to that beautiful structure of rational jurisprudence, which has deservedly acquired the admiration of mankind.

(*a*) This work was originally published in 1787.

A SYSTEM OF THE LAW OF MARINE INSURANCES, &c. &c. &c.

CHAPTER I.

Of the Policy.

POLICY is the name given to the instrument, by which the contract of indemnity is effected between the insurer and insured; and it is not, like most contracts, signed by both parties, but only by the insurer, who on that account, it is supposed, is denominated an underwriter. Notwithstanding this, there are certain conditions, of which we shall hereafter have occasion to speak, to be performed as well by the person not subscribing, as by the underwriter, otherwise the policy will be void. Of policies there seem to be two kinds, *valued* and *open* policies: and the only difference between them is this, that in the former, goods or property insured are valued at prime cost, at the time of effecting the policy; in the latter, the value is not mentioned: that in case of an open policy, the real value must be proved; in a valued policy it *is agreed*, and is just as if the parties had admitted it at the trial. 2 Burr. 1117.

Although policies of insurance are not to be ranked with specialty contracts, not being under seal, yet they have always been held as sacred agreements, and of the first credit: so Skinn. 54.

much so, that when once they are underwritten, they cannot be altered by either party; because it would open a door to an infinite variety of frauds, and introduce uncertainty into a species of contract, of which certainty and precision are the most essential requisites.

Henkle v. The Royal Exch. Assur. Company, 1 Ves. 317.

In a case before Lord Chancellor *Hardwicke*, this doctrine was admitted in its full extent. The plaintiff had insured a ship at and from *London* to *Ostend*, from thence to *Rotterdam*, from thence to the *Canaries*, warranted an *Ostend* ship, which ship was afterwards taken. The bill was brought to have the policy rectified, for that the intention of the parties was mistaken therein, which was, that the warranty was too general, and that the voyage should have been stated to take place from *Ostend* only, and not from *London*. The evidence in this case was the deposition of *Knox*, the agent for the company; who deposed that the plaintiff applied to him to insure the ship, and that he believed the plaintiff told him, she was, or had been an *English* ship, and might say something concerning the manner or intent of making her an *Ostend* ship; but that his answer was, that he would not enter into the manner, but that if the plaintiff would warrant her to be an *Ostend* ship, he would insure; and that on those terms, and no other, the agreement was made. There was the evidence of another person, who varied from *Knox*; in addition to which it was said, there was the evidence arising from circumstances, for that it was impossible for the plaintiff to intend to insure her as an *Ostend* ship, she being then in *London*, and could not be an *Ostend* ship without going to *Ostend*; for which proof was read that it was necessary she should be registered.

Lord Chancellor. — "The first question is, Whether it sufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement? It is certain, that to come at that, there ought to be the strongest proof possible; for the agreement is twice reduced into writing in the same words, and must have the same construction: and yet the plaintiff seeks, contrary to both these, to vary them, and that in a case, where his witnesses vary from each other. The single deposition, upon which it depends, is very uncertain; and imports that they relied on the

the plaintiff's warranty, leaving the transaction relating to the manner of making her an *Ostend* ship entirely to himself. His Lordship, therefore, as there was no evidence to vary the contract from the written words, ordered the bill to be dismissed."

At the same time it must be observed, that cases frequently may, and do exist, in which a policy, upon proper evidence, may be altered without any violation of the principles above laid down, and which has been often done by the courts, both of law and equity; for let it be remembered once for all, that in questions of insurance, which is a contract founded upon broad equitable principles, courts of common law are bound by the same rules of decision as courts of equity. After signing, policies are likewise frequently altered by *consent* of the parties, and such policies are good, agreeably to the maxim, *consensus tollit errorem.*

An instance of the former kind of alteration of a policy occurs in the chancellorship of Lord *Hardwicke*, to whose decision we last referred. The insurance was upon the ship five hundred pounds, and the policy stated, that the adventure was to commence immediately *from the departure of the ship from Fort St. George to London.* The bill was brought by the plaintiff, suggesting that the owner had employed a Mr. *Halhead* to insure the ship with the defendants, to commence *from her arrival at Fort St. George:* that a label, agreeable to those instructions, with all the particulars of the agreement, had been entered in a book, and subscribed by *Halhead*, and two of the directors of the company; that by a *mistake* the policy was made out different from the label; that the ship being lost in the Bay of *Bengal*, *after* her arrival at *Fort St. George*, but *before* her departure for *England*, the company refuse to pay; upon the suggestions, the plaintiff prayed that the mistake might be rectified, and that the company might be ordered to pay five hundred pounds with interest.

Motteux v. the Gov. and Comp. of the London Assurance, 1 Atkyns, 545.

His Lordship was of opinion that the label was a memorandum of the agreement, in which the material parts of the policy were inserted; that although the policy was ambiguous, the label made it clear; and as it was only a mistake of the clerk, it ought to be rectified according to the label.

Bates v. Grabham, Salk. 444.

In an action upon a policy of insurance and *non assumpsit* pleaded, the facts were, that *Stubbs*, a broker, had instructions to procure an insurance on goods on board the *Mary Galley*, *of St. Christopher's, Captain A. Hill, commander*: that *Stubbs*, in writing the policy, by mistake, made the insurance on the *Mary, Captain Haslewood, commander*, which was subscribed by the defendant: that the *Mary Galley* was lost, and then *Stubbs* applied to the insurers to consent to alter the policy, to which they agreed. It was urged that on account of the alteration the defendant should have an increase of premium, the ship *Mary* being stouter than the *Mary Galley*. But *Holt* Chief Justice, ruled, that the action well lay upon the policy, and that the mistake might be set right.

A policy of insurance, when effected, becomes the property of the insured: and if it be *wrongfully* withheld, either by the broker employed by him to effect it, or by any other person to whose hands it may happen to come, he may maintain an action of trover for it, as well as for any other species of property.

Harding v. Carter and another, Sittings at Guildhall, Easter Vacation, 1781.

Thus an action of trover was brought against the defendants for two policies of insurance. The defendants were brokers, who had written to the plaintiff, the master of a vessel, that they had got two policies effected; the one on account of the plaintiff's cloaths and wages, the other on account of the owners, and that the underwriter was Mr. *Newnham*. A loss having happened, the defendants produced a policy, underwritten by one *J. S.* only insuring the ship, in which the plaintiff had no interest.

Lord *Mansfield*. — "I shall consider the defendants as the actual insurers, and therefore the plaintiff must prove his interest and loss. The defence set up was, that the letter above stated in evidence was written by the defendants' clerk through mistake; and it was said, that trover could not be maintained for that which never existed: but His Lordship would not suffer the defendants now to contradict their own representation; and the plaintiff accordingly had a verdict to the amount of his interest, the premium being deducted."

It

It is material to observe, that policies of insurance, though called *written* instruments, are, for the convenience of trade, and the dispatch of business, generally printed, leaving blanks for the insertion of names and all other requisites. This being the case, it is frequently necessary to insert written clauses, in order to express the meaning of the parties to the contract, which, from some particular circumstances, the printed form may not sufficiently explain. These written clauses and conditions, thus inserted, are to be considered as the real contract; the court will look to them to find out the intention of the parties, and will consequently suffer such conditions to controul the printed words in policies of insurance. *

Having premised thus much of policies in general, it may be proper to consider this subject in a threefold point of view: First, what persons may be insurers; Secondly, what things may be insured; Thirdly, what the requisites of a policy are.

1st. What persons may be insurers. It should seem, that by the common law and usage of merchants, any person whatever might be an insurer, however unable he might be, from poverty, to make up the losses insured against, provided the merchant was weak enough to trust to such a security. In process of time, however, there were so many who made a shew of great wealth, in order to deceive the honest and unsuspicious trader out of his premiums, and who were in insolvent circumstances, that it became an object of national concern, and parliamentary interference. The mischiefs then existing in this branch of trade, and the dangerous consequences thence arising to the interests of the country, are to be collected from the preamble of the statute, which passed in the reign of *George* the First, to remedy these evils, and which has in some, though not in any great degree, restrained the rule of the common law as to the unlimited right any man or body of men had to become insurers. "Whereas it has been "found by experience, that many particular persons, after

6 Geo. 1. c. 18.

* See the effect of the written and printed clauses in a policy of insurance very lucidly explained by Lord *Ellenborough* in giving judgment, in a cause of *Robertson* v. *French*, post, Ch. 2. *Of the Construction of a Policy of Insurance.*

 "they

"they have received large premiums or consideration monies "for or towards the insuring of ships, goods, and merchan-"dizes at sea, have become bankrupts, or otherwise failed in "answering or complying with their policies of insurance, "whereby they were particularly engaged to make good, or "contribute towards the losses which merchants and traders "have sustained, to the ruin and impoverishment of many "merchants and traders, and to the discouragement of adven-"turers at sea, and to the great diminution of the trade, "wealth, strength, and publick revenues of the kingdom: "And whereas it is conceived, that if two several and distinct "corporations, with a competent joint stock to each of them "belonging, and under proper conditions, restrictions, and "regulations, were erected and established for assurance of "ships, goods, or merchandizes at sea, or going to sea, (ex-"clusive of all or any other corporations or bodies politic "already created, or hereafter to be created, and likewise "exclusive of such societies or partnerships as now are, or may "hereafter be entered into for that purpose,) several mer-"chants or traders, who adventure their estates, or part of "their estates, in such ships, goods, and merchandizes, at "sea, or going to sea, (especially in remote or hazardous "voyages,) would think it much safer for them to depend "upon the policies or assurances of either of those two cor-"porations, so to be erected and established, than on the "policies or assurances of private or particular persons." The statute then goes on to authorize his majesty to grant charters to two distinct companies or corporations, for the assurance of ships, goods, and merchandizes, at sea, or going to sea, and for lending money on bottomree. The statute also enacts that the corporations may purchase lands to the amount of one thousand pounds *per annum*, may have a common seal, and may be capable to sue and be sued at law; that each corporation shall provide a sufficient stock of ready money to satisfy and discharge all just demands, arising upon their policies of insurance; and in case of refusal, the parties insured may bring their action against the corporation, and shall recover *double* damages and costs. This clause, however, giving double damages, was afterwards thought by the legislature to be hard and oppressive; and therefore, by a clause in a subsequent statute, these corporations were allowed to plead the general issue

8 Geo. I. c. 15. s. 25.
11 Geo. I. c. 30. s. 43.

issue to any action brought against them; and the jury, in estimating the damages, as well with respect to them as any other persons, were left to their own discretion. Vide post, c. 20.

After several other clauses for the internal regulation of these corporations, the statute of the sixth of *Geo.* the First goes on to prohibit any other society or partnership whatsoever from making insurances, or lending money on bottomree. "And be it enacted, that, from and after the granting or making the said charters or indentures for erecting the two corporations before mentioned, and passing the same under the great seal, for and during the continuance of the said corporations respectively, or either of them, all other corporations or bodies politick, before this time erected or established, or hereafter to be erected or established, whether such corporations or bodies politick, or any of them, be sole or aggregate, and all such societies and partnerships as now are, or hereafter shall or may be, entered into by any person or persons, for assuring ships or merchandizes at sea, or for lending money on bottomree, shall, by force and virtue of this act, be restrained from granting, signing, or underwriting any policy of assurance, or making any contracts for assurance of or upon any ship or ships, goods, or merchandizes, at sea, or going to sea, and for lending any monies by way of bottomree as aforesaid: and if any corporation or body politick, or persons acting in such society or partnership (other than the two corporations intended to be established by this act, or one of them) shall presume to grant, sign, or underwrite, after the twenty-fourth day of *June* 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods, or merchandizes, at sea, or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy and policies of assurance of or upon any such ship or ships, goods, or merchandizes, shall be *ipso facto* void, and all and every such sum or sums so signed and underwritten in such policy or policies shall be forfeited, and shall and may be recovered, one half to the use of his majesty, the other to that of the informer, by action; and if any corporation or bodies politick, or persons acting in such society or partnership, other than the two corpora- Sec. 12.

"tions intended to be erected by this act, or one of them, shall "presume to lend, or agree to lend, or advance, by themselves "or any others on their behalf, after the said twenty-fourth day "of *June* 1720, any money by way of bottomree contrary "to this act, the bond or other security for the same shall be "*ipso facto* void, and such agreement shall be adjudged to "be an usurious contract, and the offenders therein shall "suffer as in cases of usury: nevertheless it is intended and "hereby declared, that any private or particular person or "persons shall be at liberty to write or underwrite any po-"licies, or engage himself or herself in any assurances of, for, "or upon any ship or ships, goods, or merchandizes at sea, "or going to sea, or may lend money by way of bottomree, "as fully and beneficially as if this act had never been made, "so as the same be not on the account or risque of a cor-"poration or body politick, or upon the account or risque of "persons acting in a society or partnership for that purpose "as aforesaid."

Sullivan v. Greaves, Sittings after Easter 1789.

Upon this clause of the statute, a question arose at *Guildhall*. It was an action brought against the defendant to recover a sum of money received by him from one *Bristow* to the plaintiff's use. The plaintiff was an underwriter, and the defendant was a broker; and a loss having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but *Bristow*, having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendant, to recover it from whom this action was brought.

Lord *Kenyon* C. J.—"I am of opinion that the plaintiff cannot recover; for this is clearly a partnership within the act of parliament. If a single name appears on the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a *bonâ fide* insurance, by saying to an innocent person, there was a secret partnership between another and myself, and therefore the policy is void. But here the plaintiff is himself the underwriter, who comes to enforce an illegal contract: it is a partnership *pro hac vice*: and this party cannot apply to a Court of Justice to enforce a contract founded in a breach of the law."

No

No motion was ever made to set aside the nonsuit; but two or three days afterwards, Lord *Kenyon* took occasion to mention to the bar, that he had stated the case to the other Judges of the Court of *King's Bench*, who were unanimously of the same opinion with His Lordship.

In a more modern case, the decision in *Sullivan* v. *Greaves* came under discussion in the Court of *Common Pleas*, and the opinion given by Lord *Kenyon* was confirmed by the unanimous opinion of that Court.

Mitchell and others, assignees of Robertson a bankrupt, v. Cockburn, assignee of Tyler a bankrupt, 2 H. Blac. 379.

The facts were, that the two bankrupts were engaged in a partnership for the insurance of ships, which was carried on in the name of *Robertson*, who, at the time of his bankruptcy, had paid a much larger sum for losses than he had received for premiums; and to recover a moiety of this sum from *Tyler*'s estate was the object of this action. The Lord Chief Justice *Eyre* having nonsuited the plaintiffs at the trial, and a motion having been made to set the nonsuit aside, the learned Judges, after argument at the bar, delivered their opinions.

Ld. Ch. J. *Eyre*. — "This question depends on the true construction of the stat. 6 *Geo.* 1. c. 18. By that act, the two corporations became the purchasers of the exclusive privilege of insuring on a joint stock; and to give effect to that privilege, all other persons are prohibited from insuring on a joint stock. Now it appears clearly on the first view, that the provisions of the act are at an end, if a person, by merely insuring in his own name, can have the advantage of a joint capital, which the act meant to prohibit. This partnership therefore is contrary to the spirit of the act: and it is also contrary to the letter of it. The 12th section directs, that all societies, &c.* This does not at all go to confine the meaning of the legislature to an avowed partnership, insuring publickly in their own names; but the object is to prevent any other joint stock being embarked in insuring. This being so, the consequence unavoidably is, that no contract can arise directly out of such a proceeding, so as to be the foundation of an action."

* Vide supra, p. 6.

Mr. J. *Heath*. — "I am of the same opinion. It seems to me that the object of the statute would be totally defeated, if it were to extend only to those policies, in which the names of all the partners were inserted. It expressly declares, that every policy subscribed by any person acting in a partnership shall be absolutely null and void, though it may be true that the party subscribing shall be estopped from setting up a secret partnership to defeat a *bonâ fide* insurance. And the reason is obvious; trade is carried on according to the capital employed. Now the insurances would run to the extent of the capital, in whatever name the policy might be subscribed. The object therefore of the statute was to prevent the employment of a joint capital, which would afford the greatest competition with the established corporations."

Mr. J. *Rooke*. — "As to the second point, I agree that if the contract be illegal, no action can arise out of it. But as to the first question, whether this contract were illegal or not, I must confess I had great doubts, till I heard the opinions of my Lord Chief Justice and my Brother *Heath*, and also the case cited from *Park's Insurance*, for it seemed to me that the statute only meant to prohibit insurances where both parties knew that a partnership existed, but not where there was a sleeping partnership. But I was very much struck with the observations of my Brother *Heath*, that the extent of the insurance would be in proportion to the capital employed, and if there were an increased capital there would be an increased rivalship with the corporations. Whatever doubts therefore I had, I submit to the authority of the other Judges."

Booth v. Hodgson, 6 Term Rep. 405. Acc.

Rule for setting aside the nonsuit was discharged.

Aubert v. Maze, 2 Bos. & Pull. 371.

In a subsequent case, all these cases were considered and fully confirmed in the Court of *Common Pleas*, by Lord *Eldon*, *Heath*, *Rooke*, and *Chambre*, Justices.

Lees v. Smith, 7 Term R. 338.

The rule then established by all these cases seems to be this, that if the credit of any company or society (except the two mentioned in the statute) be in any event pledged in a contract of this nature, the contract is void. And therefore where a company of ship-owners engaged to insure each other's ships, though

though they covenanted *severally*, and not *jointly*, to pay a certain sum in case of loss in proportion to their respective shares, yet as there was a clause providing that in case of the insolvency of any one of the members, all the others were to be responsible, the contract was void.

But if in such an association, each individual subscriber is only liable for the sum to which his name appears, and not for the default of the other subscribers, it has been held by Lord *Kenyon*, that such an association does not infringe on the act of parliament.

Harrison v. Millar, Sittings after Mich. 1796. 7 Term R. p. 340. note (d).

There are clauses, in a subsequent part of the statute now under discussion, securing to the *South Sea*, and *East India* Companies, all the rights and privileges which they had enjoyed previous to the passing of that act, and the right of lending money on bottomree to the captains of their own ships.

Sec. 24. 26. 28.

This statute is the only positive regulation to be found in the law of this country, with respect to what persons shall, or shall not be insurers. By virtue of that act, the two corporations, under the names of the *Royal Exchange Assurance* Office, and the *London Assurance* Office, were created and established, by charter of *George* the First, under the great seal of *Great Britain*, bearing date the twenty-second day of *June*, in the sixth year of his reign; and they still continue offices for the insurance of property. The legislature having thus anxiously provided for the security of those merchants, who might be desirous of carrying on an extensive trade, but who were deterred from doing so through fear of the insolvency of underwriters, having stipulated with the company that they should have sufficient funds for the payment of all demands that might be made, and at the same time, allowing to private underwriters the full liberty of insuring to any amount with those who were satisfied to trust to their private securities only; it is not to be wondered at, that the business of insurance increased to a degree almost inconceivable. Indeed, any person, since this statute, may insure as at the common law, with this single exception, that any policy subscribed by a private firm or partnership, is absolutely void.

2dly,

2dly, What things may be insured. I beg leave here to premise, that I do not mean at present to go into the great question of insurance, *upon interest or no interest*, having reserved that for the subject of a distinct chapter. My design in this place is only to shew, what kinds of property are the subject of insurance, upon supposition that every person, making insurance, is interested in the thing insured as the law requires.

1 Magens, 4.

See post. chap. 2?, and 23.

The most frequent subjects of insurance are ships, goods, merchandizes, the freight or hire of ships: also houses, warehouses, and the goods laid up in them from danger by fire: and insurance on lives. Of the two last of which, more will be said hereafter. But although insurances upon such property, as we have just enumerated, most frequently occur in practice; yet in the law-books we meet with cases which can hardly fall within any of those descriptions.

Thus bottomree and *respondentia* are a particular species of property which may be the subject of insurance. But then it must be particularly expressed in the policy to be *respondentia* interest; for under a general insurance on *goods*, the party insured cannot recover money lent on bottomree. Such has been, and is at this day, the established usage of merchants.

Glover v. Black, 3 Burrow, 1394. and 1 Blackstone Rep. 405.

This was solemnly decided in an action upon a policy of insurance "upon *goods and merchandizes*, loaden, or to be loaden "aboard the *Denham*, *William Tryon*, commander, at and "from *Bengal*, to any ports or places whatsoever in the *East* "*Indies*, until her safe arrival in *London*." The evidence appeared to be, that before the signing of the policy, the plaintiff had lent Captain *Tryon*, *upon the goods*, then loaden, and to be loaden on board the said ship, on account of the said Captain *Tryon*, the sum of seven hundred and sixty-four pounds, at *respondentia*, for which a bond was executed in the usual form: that the ship, at the time of the loss, had goods and merchandizes on board, the property of Captain *Tryon*, of greater value than all the money he had borrowed: that the ship was afterwards burnt, and all the goods and merchandizes were totally consumed and lost. Upon these facts, the question was, Whether the plaintiff could recover? This case was twice argued at the bar; the Court took time to consider it, and were unanimous in their determination.

Lord *Mansfield.*—" I inclined at the trial, and since upon the argument, to support this insurance, being convinced that it is fair, and that the doubt has arisen by a slip in omitting to specify (as it was intended to have been done) that this was a *respondentia* interest. The ground of supporting this insurance, if it could have been supported, was a clause of the 19 *G.* 2. *c.* 37. *s.* 5. which, as to the purpose of insurance, considers the borrower as having a right to insure only for the surplus value, over and above the money he has borrowed at *respondentia.* Yet we are all satisfied that this act of parliament never meant, or intended to make, any alteration in the manner of insurances; its view was to prevent gaming or wagering policies, where the insurer had no interest at all; and if the lender of money at *respondentia* were to be at liberty to insure for more than his whole interest, it would be a gaming policy; for it is obvious, that if he could insure all the goods, and insure his *respondentia* interest besides, this would amount to an insurance beyond his whole interest. In describing *respondentia* interest, the act gives the lender *alone* a right to make insurance on the money lent: so that the act left it on the practice. I have looked into the practice, and I find, that bottomree and *respondentia* are a *particular species* of insurance in themselves, and have taken a particular denomination. I cannot find even a *dictum* in any writer foreign or domestic, that the *respondentia* creditor may insure upon the *goods, as goods.* I find too, by talking with intelligent persons very conversant in the knowledge and practice of insurances, that they always do mention *respondentia* interest, whenever they mean to insure it. It might be greatly inconvenient to introduce a practice *contrary to general usage,* and there may be some opening to fraud if it be not specified. The ground of our resolution is, " That it is now established, as " the law and practice of merchants, that *respondentia* and " *bottomree* must be specified and mentioned in the policy of " insurance."

It is to be observed, that in this judgment the Court confined itself entirely to the case then before it, but did not mean to decide, that a person, having a special interest in goods, could not recover under an insurance upon goods generally. Lord *Mansfield,* indeed, expressly said, at the conclusion of

his

3 Bur. 1401. his argument, that they did not mean to determine, that no special interest in goods might be given in evidence, in other cases than in those of *respondentia* and *bottomree*, if the circumstances of the case should happen to admit of it. The lien which a factor, to whom a balance is due, has upon the goods of his principal, comes under the exception taken by the Court; and an insurance upon such an interest seems to have been admitted, if not absolutely held, to be good, in the case of *Godin* v. *London* Assurance Company, which will be fully stated in that part of this work which treats of double insurances. (1 Bur. 489.)

But although the decision in *Glover* and *Black* has never been called in question, yet it has since been ruled, that money expended by the captain for the use of the ship, and for which *respondentia* interest was charged, may be recovered under an insurance on *goods, specie, and effects,* provided the usage of the trade, which in matters of insurance is always of great weight, sanctions it.

Gregory v. Christie, B. R. Trinity, 24 Geo III.

Thus in an action upon a policy of insurance *on goods, specie, and effects* of the plaintiff, who was also the captain, on board the ship, the plaintiff claimed under that insurance money expended by him in the course of the voyage for the use of the ship, and for which he charged *respondentia* interest.

Lord *Mansfield*, after delivering his opinion upon another point, which arose in the cause, and which will be mentioned in another part of this work, said, as to the second question, whether the words, "*goods, specie, and effects,*" extended to this interest, I should think not, if we were only to consider the words made use of. But here there is *an express usage,* which must govern our decision. A great many captains in the *East India* service swear, that this kind of interest is always insured in this way, and I observe the person here insured is the *captain.*

1 Magens, 18.

By the maritime regulations of most, if not of all, the trading powers in *Europe,* insurances upon the wages of seamen are forbidden; a regulation founded in wisdom and sound policy. In *Great Britain,* a great and commercial nation,

such an ordinance is particularly necessary, and it is agreeable to the policy of the general law of that country, by which it is declared, "That no master or owner of any merchant-ship shall pay to any seaman, beyond the seas, any money or effects on account of wages, exceeding one moiety of the wages due, at the time of such payment, till such ship shall return to *Great Britain* or *Ireland*." By this salutary law, the sailors are interested in the return of the ship; they will, on that account, be prevented from deserting it when abroad, from leaving it unmanned, and in times of danger, arising either from perils of the sea, or the attacks of an enemy, will be more anxious for its preservation. But these good effects would be entirely defeated, if insurance on their wages were to be permitted; for to whatever cause the loss might be attributed, they would still be secure. It has been held in an express case upon the subject, that a sailor can neither insure his wages, nor any commodity, which he is to receive at the end of the voyage in lieu of wages. However, it should seem, that this regulation does not mean to prevent mariners from insuring for the homeward voyage those wages which they have received abroad, or goods which they have purchased with those wages in order to bring them home; but, in such a case, they are considered in the same light with other men.

8 Geo. 1. ch. 24. s. 7.

Webster v. De Tastet, 7 Term R. 157.

1 Magens, 19.

These prohibitions do not extend to the masters of ships; and therefore it has been held that an insurance on the commission, privileges, &c. of the captain of a ship in the *African* trade is legal.

King v. Glover, 2 New Rep. 206.

In an action upon a policy of insurance upon *Fort Marlborough*, otherwise *Bencoolen*, in the *East Indies*, for twelve calendar months, from the first of *October* 1759, to the first of *October* 1760, against an *European* enemy, for the benefit of the governor, it was doubted by the learned chief justice who tried that cause, whether a policy against the loss of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a sailor to insure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cause, after mentioning this doubt, which occurred to his mind, he went on thus: "But "con-

Carter v. Boehm, 3 Bur. 1905. and 1 Blackst. 593. Lord Mansfield

"considering that this place, though called a fort, was really "but a factory or settlement for trade; and that he, though "called a governor, was really but a merchant; considering "too, that the law allows a captain of a ship to insure goods "which he has on board, or his share in the ship, if he be a "part owner; and the captain of a privateer, if he be a part "owner, to insure his share; considering too, that the objection could not, upon any ground of justice, be made by "the insurer, who knew him to be the governor at the time "he took the premium; and as with regard to principles of "public convenience, the case so seldom happens, (I never "knew one before,) any danger from the example is little to "be apprehended; I did not think myself warranted, upon "that point, to nonsuit the plaintiff: especially too, as the "objection did not come from the bar. Though this point "was mentioned, it was not insisted upon at the last trial; "nor has it been seriously argued, upon this motion, as sufficient alone to vacate the policy: and if it had, we are all "of opinion, that we are not warranted to say that it is void "upon that account."

Ord. of Stockholm. Bynkershoek's Quæst. Juris pub. lib. I. c. 21. p. 153.

It has long been a question, how far insurances upon ships or goods of enemies are politick or legal. Upon the continent of *Europe* it should seem, that they are in general absolutely prohibited, under penalty of the insurance being void, and the delinquent's forfeiting the sum, to which he had subscribed. These laws have been passed from an idea, that such insurances are prejudicial to the interests of the country tolerating such contracts, by enabling an enemy to continue his trade, on account of the degree of protection thus afforded him against the maritime strength of the nation making the insurance. In *England*, till very lately, this question has been undecided; but the Court of King's Bench have, in some modern instances, been unanimously of opinion that such insurances are illegal and absolutely void. I shall, however, when I come to the chapter on illegal voyages, state the arguments on both sides of this important question. In this place I shall only observe, that in the year 1748, a bill was introduced into parliament, "to prevent assurances on ships belonging to *France*, and on merchandizes and effects laden "thereon, during the then existing war with *France*." That bill

Brandon v. Nesbitt, and Bristow v. Towers, 6 T. R. 23. and 35. Potts v. Bell, 8 T. R. 548.

bill was opposed on principles of policy and expediency, by the two greatest lawyers and most eminent speakers of that age, the Honourable *William Murray* and Sir *Dudley Ryder*; but the legislature thought proper to pass the bill into a law, inflicting a penalty of 500*l.* upon the persons making such insurances, and also declaring the policy to be void.

Deb. in House of Com. by Debrett, vol.ii. p.171. 21 Geo. 2. c. 4.

The existence of that act, however, was limited by the duration of the then war. But in the year 1793 a similar legislative provision was made, declaring that insurances in the act mentioned shall not only be void, but the offending person shall be imprisoned three months. This statute was also temporary; but the decisions above alluded to, and which will be fully quoted hereafter, have determined that all insurances upon the property of an open enemy are void, independant of the acts of parliament. It is not to be dissembled that these decisions are rather in opposition to the sentiments of Lord *Mansfield* and Lord *Hardwicke*: for although the case does not seem ever to have come for a judicial opinion before them, yet it is evident, from what they have declared both in parliament and on the bench, that on principles of expediency, those illustrious men were inclined to support such insurances, although it should seem, with all deference to such names, that even the expediency of the measure may greatly be doubted.

33 Geo. 3. c. 27. s. 4.

1 Ves. 320. Gist v. Mason, Sittings at Guildhall, Mich. Vac. 1785.

One species of insurance on foreign ships or goods was formerly prohibited by statute, with a view to secure to the *East India* Company the sole trade to and from the *East Indies*, and other places, beyond the *Cape of Good Hope*. The statute, after reciting, that to admit of insurances on the ships or vessels of foreigners trading to the *East Indies*, may be a means of encouraging His Majesty's subjects to share with foreigners, in establishing new societies or companies for carrying on the said trade in the dominions of foreign states or princes, enacts, "That no insurances shall be made, or "money lent on bottomree, on foreign ships or goods, bound "to or from the *East Indies*, under the forfeiture of treble "the sum insured or lent." It contains an exception, however, in favour of insurances made, or to be made, on ships of the subjects of such sovereigns, as carried on a trade with

25 Geo. 2. c. 26.

that part of the world, previous to the month of *October* 1748. This act was to be in force for seven years. Whether upon a trial it was found to be a politick or wise regulation, I have not been able to discover: but the presumption is to the contrary; as it does not appear from the statute book, that this act of parliament was continued, or that it was revived by any subsequent statute.

Malyne, 108. 3 Burr. 1555. 3dly, Of the requisites of a policy. The form of a policy, now used in *London*, is nearly the same which was adopted two hundred years ago, as may be collected from *Malyne*; but its antiquity cannot preserve it from just censure, it being very irregular and confused, and frequently ambiguous, from making use of the same words in different senses.

The essentials in the contract of insurance are; First, the name of the person for whom the insurance is made: Secondly, the names of the ship and master: Thirdly, whether they are ships, goods, or merchandizes, upon which the insurance is made: Fourthly, the name of the place where the goods are laden, and whither they are bound: Fifthly, the time when the risk begins, and when it ends: Sixthly, all the various perils and risks which the insurer takes upon himself: Seventhly, the consideration or premium, paid for the risk or hazard run: Eighthly, the month, day, and year, on which the policy is executed (*a*): Ninthly, the stamps required by act of parliament. Of each of these in their order.

First, Of the name of the person insured. It was formerly very much the practice to effect policies of insurance, in *blank* as it was called, that is, without specifying the names of the persons, for whose use and benefit, or on whose account such insurances were made; a practice which had been found in many respects to be mischievous, and productive of great in-
2 Magens, 65. 169. conveniences. This mischief was remedied at a very early period in *Genoa* and *France* by the marine ordinances of those

(*a*) If a policy is executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject-matter is afterwards added in writing, and signed by some of the underwriters only; this cannot bind those who do not sign. *Langhorn* v. *Cologan*, 4 *Taunt.* 330.

countries,

countries, which required the name of the person insured to be inserted in the policy, and whether he was to be considered in the capacity of principal or factor. In *England* a similar regulation took place in the year 1774, with respect to insurances upon lives; but it was not till the year 1785, that any provision was made upon the subject as to policies upon ships and merchandizes, the statute of the 14th *Geo.* 3. having in terms exempted marine insurances from its operation.

14 Geo. 3. c. 48.

The statute declares, "That, from and after the fifth day "of *July* 1785, it shall not be lawful for any person or persons, who reside in *Great Britain*, to make, or cause to be "made, any policy or policies of insurance upon his, her, or "their interest in any ship or ships, or any goods, merchandizes, effects or other property, without inserting in "such policy or policies, *his, her, or their own name or names*, "as the person interested therein, or the *name or names of* "*the person or persons* who shall effect the same, *as the agent* "*or agents* of the person or persons so really interested "therein, or for whose use or benefit, or on whose account, "such policy or policies is or are underwrote: and that it "shall not be lawful for any person or persons, who shall not "live or reside in *Great Britain*, to make, or cause to be "made, any policy or policies of assurance upon his, her, or "their interest in any ship or ships, or on any goods, merchandizes, effects, or other property, without inserting in "such policy or policies the name or names of the agent or "agents of the person or persons so really interested therein, "and for whose use or benefit, or on whose account, the "same is or are so made and underwrote: and that every "policy or policies of assurance, made or underwrote contrary to the true intent and meaning hereof, shall be null "and void to all intents and purposes."

25 Geo. 3. c. 44.

See Cox and another, Executors, v. Parry, 1 Term Rep. 564. in which it was held that the Executors could not recover, because amongst other grounds, the name of their Testator was not inserted in the policy.

Upon the statute just recited, a question of some consequence very soon arose, namely, Whether, when the agent effects a policy for the principal residing abroad, it be necessary to insert his name in the policy, *as agent*. Upon a debate, it was held, that if it be not stated, that he effected the policy, *as the agent* of the principal, the policy will be void within the statute. Another question also occurred in the

Pray and others v. Edie, 1 T. R. p. 313.

the same cause, Whether it was not the intention of the legislature, when the principal resided abroad, that the agent should live in *England*. It did not become necessary for the court to decide the latter question; but the leaning of the judges clearly was in the affirmative.

If there were more persons interested than one, it was absolutely necessary under the above statute that the names of all should be inserted, otherwise the policy was void. Nor would any other description answer the design of that statute. Thus in a case, where there were several plaintiffs, the policy was made "*In the name of Mr. William Wilton and the rest of the* "*owners*," Mr. Justice *Buller* held the policy was void under the statute.

Wilton and others v. Keaston, B. R. at Guildhall Sittings after Michaelmas 1787.

The decisions which have been made upon this statute have now become very immaterial; and are only referred to in order to shew the complete history of that branch of the law, which we are discussing; for such mischiefs and inconveniences were found to arise to persons interested in ships or vessels from that act of parliament, that, by a subsequent statute, it was wholly repealed. But it was not deemed expedient again to allow of policies in blank; and therefore the same statute declared, "That it should not be lawful, from "and after the passing of that act, for any person or persons, "to make or effect, or cause to be made or effected, any policy "of assurance on any ship or vessel, or upon any goods, "merchandizes, effects, or other property whatsoever, without "first inserting, or causing to be inserted in such policy, the "name or names, or the usual stile and firm of dealing of "one or more of the persons interested in such assurance; "or without, instead thereof, first inserting the name or "names of the usual stile and firm of dealing of the consignor or consignors, consignee or consignees, of the goods "or property so to be insured; or the name or names, or the "the usual stile and firm of dealing of the person or persons "residing in *Great Britain*, who shall receive the order for "and effect such policy, or of the person or persons who "shall give the order or directions to the agent or agents immediately employed to negociate or effect such policy." The statute further declares "that every policy made "or

28 Geo. 3. c. 56.

Although it may not be necessary to specify in the declaration what character the person making the insurance bears, namely, whether consignor or consignee, &c. yet having averred that they answered a particular description, they were bound to prove it. Bell v. Janson, 1 M. & S. 201.

"or underwrote contrary to the true intent and meaning "of this act, shall be null and void to all intents and pur- "poses."

Upon this act it has been held, that it is not necessary where a policy is effected by an agent, to add the word *agent* or any other description to his name, in the policy itself. And it has also been decided, that a policy effected by a broker, describing himself therein *as agent*, has sufficiently complied with the requisition of the statute. It must be presumed after verdict that it was proved that the plaintiffs fell within one or other of the descriptions in the act.

De Vignier v. Swanson, B. R. Mich. 39 Geo. 3. Bell v. Gilson, 1 Bosanquet & Puller, 34 c. and Mellish v. Bell, 15 East, 4.

Previous to the passing of either of these acts it was held, that the husband of a ship had no right to insure for any part-owner, without his particular direction: nor for all the owners in general, without their general direction, or something equivalent to it.

French v. Backhouse, 5 Burr. 2727.

But if part owners of a ship be in partnership generally, an order to insure given by one renders all liable.

Hooper v. Lusby, 4 Camph. 66.

Secondly, of the names of the ship and master. I do not find any express regulation of this matter in *England*; but it seems to be necessary, by the law and usage of merchants, to insert the names of the ship and master, in order to fix with precision the bottom upon which the adventure is to be made, and the captain, by whose direction the ship is to be navigated, because, according to the degree of strength and sufficiency of the one, and the skill, ability, and knowledge of the other, the risk is encreased or diminished; and so also probably will the amount of the premium be regulated. The usage of the merchants of *England* in this respect is agreeable to the express laws and regulations of other maritime states upon this point. Sometimes, however, there are insurances generally "*upon any ship or ships*" expected from a particular place: and although it is more accurate to insert the name of the captain, I would not be understood to assert, as no decision has been made, that if a different captain came in the ship from that whose name is mentioned in the policy, it would therefo be void; especially as the policy always con-

Ord. of Lew. 14. tit. Insurance, art. 3. Ord. of Amsterdam, s. 2.

tains the words "or whosoever else shall go for master in the "said ship."

Neither would the insurance be vitiated if the name of the ship was mistaken, provided the identity was proved, and that there was no fraud, for as the policies contain in the printed form, "or by whatsoever name the ship should be called," those words are not confined to the case of a ship having another name than that mentioned in the policy. The case in which this point lately arose was in an insurance on goods described by the policy to be on board *the American ship President*, the real name being *The President*; but the broker, having been directed to insure the ship *President*, and to designate her *an American ship*, had by mistake described her as above. The Court were of opinion, that the whole was to be taken as her name, and not as a warranty of her being "an *American* ship" called *The President*. And it was also holden to be no variance, that the real name of the ship was *The President*, the identity of the ship meant to be insured with that name being proved; and no fraud being imputed to the transaction. And in delivering his opinion, Mr. Justice *Lawrence* read a note of a case decided by Lord Chief Justice *Lee*, at *Guildhall*, exactly in point. The insurance there was made on "The *Leopard*, *or by whatsoever other name*, &c. "whereof was master for that voyage, *A. B.*, or whosoever "else should be master." Upon the evidence of *A. B.* it appeared, that this ship was called *The Leonard*, and was never called *The Leopard*. But the Lord Chief Justice was of opinion, that it was only necessary to prove the identity, which was done by Captain *A. B.*

LeMesurier v. Vaughan, 6 East, 382.

Hall v. Molyneux, Dec. 1744, at Guildhall, 6 East, 385. MSS. Cases penes me.

Since the publication of the two first editions of this work, the validity of insurances *upon ship or ships* was very elaborately discussed in the Court of Common Pleas, and the judgment of the court, consisting of Lord Chief Justice *Eyre*, Mr. Justice *Buller*, Mr. Justice *Heath*, and Mr. Justice *Rooke*, was unanimous in their favour; and that the assured had a right to cover by such policy whatever ship he thought proper, that fell within the terms of it. The facts of the case were these:—On the 24th *May* 1792, *Freeland* and *Rigby*, merchants at *Saint Vincent's*, wrote to the plaintiffs, merchants at *Liverpool*,

Kewley and another v. Ryan, 2 H. Blackst. Rep. p. 343. See this case again quoted for another point, post, c. 17.

Liverpool, who were also partners in a house of the same name at *Grenada*, requesting them to get 1,260*l.* insured on 70 bales of cotton shipped on board the *Elizabeth*, from *Grenada* to *England*, and also 1,300*l.* on another cargo of cotton and other goods, which they intended to ship on board *some other ship* that should sail with the first convoy, and therefore directed the latter insurance to be *on ship or ships*. The plaintiffs accordingly, by their broker, insured 1,260*l.* on board the *Elizabeth* in *London*, and 1,300*l.* on board *ship or ships*, viz. 700*l.* at *Liverpool* and 600*l.* in *London*. The policy for 700*l.*, of which the defendant underwrote 50*l.*, and on which the action was brought, was *at and from Grenada to Liverpool*,* on any kind of goods as interest should appear, *in ship or ships on account of Freeland and Rigby*, warranted to sail on or before the 1st of *August* 1793, and to return 3 *per cent.* if the ship sailed with convoy bound to *Great Britain*, and arrived, *&c.* without any exception of the goods on board the *Elizabeth*. The policy for 600*l.* effected in *London*, was also *on ship or ships*, at and from *Grenada* to *Liverpool*, but with an exception of 1,260*l.* "on 70 bales of cotton *per Elizabeth, Crettin*," the same underwriters in *London* having before subscribed the policy on the *Elizabeth*. But the plaintiffs did not communicate to the underwriters at *Liverpool* the letter of *Freeland* and *Rigby*, directing an insurance on the *Elizabeth*, nor any circumstance respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship. The *Elizabeth* sailed early in *June*, and arrived safe at *Liverpool* in *August* 1793. The *Heart of Oak*, on board of which *Freeland* and *Rigby* had shipped their second cargo of cotton, *&c.* sailed the latter end of *July*, bound for *Liverpool*, but with a design *formed before the commencement of the voyage*, (as appeared by clearances, and was admitted on all sides,) to touch at *Cork* in her way to *Liverpool*, but was totally lost before she arrived at the dividing point. The defendant pleaded the general issue, and a tender of 1*l.* 10*s.* on account of the safe arrival of the *Elizabeth*, which plaintiff took out of court, and obtained a verdict for 48*l.* 10*s.*

A rule having been obtained to shew cause why there should not be a new trial on several grounds, the court discharged the rule, declaring as to this point, that the legality of the

B. R. Michael. 23 Geo. 3. See that case fully reported, 2 H. Black. Rep. 345. Note (*a*).

policy on *ship or ships* was too well established, both by usage and authority, to be disputed. As to the second, that the assured had clearly a right to apply such an insurance to whatever ship he thought proper, within the terms of it; for which the case of *Henchman* v. *Offley* was an authority.

Plantamour v. Staples, 1 Term R. 611. note (*a*) upon a case reserved.

It has also been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned.

1 Magens, 8.

Thirdly, whether they are ships, goods, or merchandizes, upon which the insurance is made, is a fact which must be stated. It is absolutely necessary that there should be a specification upon which of these the underwriter insures; because otherwise it would be impossible to know, whether, in any instance, he is liable or not to the loss sustained. But it is another question, whether, in policies upon goods, it be necessary to declare the particulars. The practice, I believe, is very unsettled. It is the opinion, however, of a very respectable merchant, that the particulars of goods should be specified, if possible, by their marks, numbers, and packages, rather than that they should be included under the general denomination of merchandize; or that if it be agreed to insert them, when known to the insured, care should be taken not to omit it, as such specification prevents much trouble in proving to the insurer the particular goods insured, which are more or less subject to damage. But this mode of particularizing property is only adviseable to be done, or, indeed, can only be done, when the risk commences at home; because, when goods are coming from abroad, it is better to insure under general expressions, on account of the various casualties which may happen to obstruct the purchase of the commodities intended to be sent. It may be proper here to mention, that there are certain kinds of merchandize which are of a perishable nature, and liable to early corruption; on account of which, the underwriters of *London* have inserted a memorandum at the foot of their policy, by which they declare, that in insurances upon corn, fish, salt, fruit, flour,

Vide the Append. No. 1.

and

and seed, they will not be answerable for any partial loss, but only for general averages, unless the ship be stranded. That in insurances on sugar, tobacco, hemp, flax, hides, and skins, they consider themselves free from partial losses, not amounting to *five per cent.*, and that on all other goods, as well as on the ship and freight, if the partial loss be under *three pounds per cent.*, unless it arise from a general average, or the stranding of the ship, they also consider themselves discharged.

This clause was introduced in the year 1749, in order to prevent the underwriters from being harassed by trifling demands, which must necessarily have arisen upon every insurance of this kind, on account of the perishable nature of the cargo. The form of this memorandum was universally used, as well by the two insurance companies, as by private underwriters, till the year 1754, when Lord Chief Justice *Ryder* ruled, and a special jury, agreeably to his direction, decided, that a ship, having run a-ground, was a stranded ship within the meaning of the memorandum; and that although she got off again, the underwriter was liable to an *average or partial loss* upon damaged corn. This decision induced the two companies to alter the memorandum, by striking out the words, "*or the ship be stranded;*" so that now they consider themselves liable to no losses which can happen to such commodities, except general averages and total losses: But the old form is still retained by the private insurers.

Per Buller Justice in Cocking v. Fraser, B. R. East, 25 Geo. 3. vide post.

Cantillon v. Lond. Assur. Comp. mentioned 3 Burr. 1553.

What shall be considered as losses within the meaning of this memorandum, will be the subject of future investigation; my design at present being only to enumerate the essentials of a policy, and the reason and origin of them, as far as I have been able to trace them.

There are, however, some kinds of property, which do not fall under the general denomination of goods in a policy; and for the loss of which the underwriters are not answerable, unless they are specifically named.

An

Ross v. Thwaite, Sit. after Hil. 16 Geo. 3. at Guildhall.

An action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's cloaths, and the ship's provisions. It was proved by an underwriter and a broker, that none of those things are within a general policy on goods; for the risk was greater as to goods lashed on deck than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater.

Lord *Mansfield* said, he thought it consistent with reason, and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

Backhouse v. Ripley, Sit. after Mich. 1802, in C. P.

And in a more modern case, Mr. Justice *Chambre* and a special jury decided, that goods stowed on deck were not within a general policy on goods.

Da Costa v. Edmonds, 4 Camph. 142.

But where there was an insurance on 40 carboys of vitriol, it was held to be sufficient that they were carefully stowed on the deck, that being a usual place for this commodity, without informing the underwriter of it; and although it was usual sometimes to bed them in sand in the hold. The court afterwards confirmed the decision at *Nisi Prius*.

It is a question whether a cargo of dollars, or other coin, jewels, *&c.* if lost, be recoverable under a policy upon goods and merchandizes generally: and I can find no printed case where the question has been at all discussed in *England*. In one case, *Da Costa* v. *Firth*, the subject-matter of the insurance was bullion, and the policy was general on goods and merchandizes: but no objection was taken on that ground, nor was the point ever argued. By the ordinances of several foreign states, *Middleburg*, *Amsterdam*, *Konigsburg*, and others, it is *specially* declared, that money shall not be recovered under the denomination of goods or merchandize; but the insurance must, in the policy, be expressed to be upon money to render it valid. The book, in which the ordinances above referred

4 Burr. 1966.

2 Magens, 71. 89. 131. 187.

1 Magens, 10.

referred to are collected, states explicitly that gold and silver, coined and uncoined, pearls, and other jewels, may be insured at *London* and *Hamburgh*, and several other places, under the general expression of merchandize.

Roccus, in his treatise upon insurances, concurs in the latter opinion, and quotes *Santerna* upon the subject; he draws a distinction, upon the merits of which I do not presume to decide, between money or jewels, for the purposes of commerce, which constitute part of the cargo, and such as are merely personal, and for private purposes; the former being clearly liable to contribute to a general average, but not the latter. His words are these: "*Assecurans merces in talem navem immissas, intelligitur assecurare pecuniam, aurum, argentum, gemmas, margaritas, et annulos in dicta navi existentes, quæ omnia, appellatione mercium, in navem immissarum, comprehenduntur, licet expressa non fuissent. Santerna declarat, quod si pecuniæ, margaritæ et annuli erant destinati ad vendendum vel mercandum alias merces, tunc appellatione mercium veniunt, et in assecuratione comprehenduntur, et loco mercium habentur: vocat dictas res merces, cum occasione earum, habeat locum contributio, sicut aliarum rerum, ne in istis assecurationibus mercatorum potius apices juris, quam veritas observari videantur: et tandem, quia largè comprehenduntur omnes res, quæ sunt destinatæ ad negotiandum, et facit etiam, quod confiscatio mercium navis extenditur etiam ad pecuniam numeratam.*" I forbear to draw any conclusion from these premises, which is the plan I have uniformly adopted, where there is no adjudged case upon the question.

See post, Roccus, Not. 17.

Money advanced to the captain abroad is not the subject of insurance; and the policy being void, the premium may be recovered back.

Sifken v. Allnutt, 1 M. & S. 39.

Fourthly, The name of the place at which the goods are laden, and to which they are bound.

This has been always held to be necessary in policies, at least for upwards of two hundred years; and must be so, on account of the evident uncertainty which would follow from a contrary

practice,

practice, as the insurer would never know what the risk was, which he had undertaken to insure.

Molloy, b. 2 c. 7. s. 14. *Molloy* has laid down this doctrine, that if a ship be insured from *London* to , a blank being left by the lader of the goods to prevent a surprise by an enemy, and if in her voyage she happen to be cast away, though there be private instructions for her port, yet the insured must sit down with his loss, by reason of the uncertainty. In support of his opinion, he cites the case of Monsieur *Gourdan* governor of *Calais*, which was decided by commissioners of assurance at *Rouen* against the assured, because, although the bills of lading truly declared the quantity and quality of the goods, the port of the ship's discharge was left a blank, on account of the war, which was then existing. Such also is now the law and usage of merchants.

It is also customary to state in the policy at what port or places the ship may touch and stay during the voyage, so that it shall not be considered as a deviation to go to any of those places.

Ord. of Antwerp, Amsterdam, France, Spain, and Copenhagen. Fifthly, The time when the risk commences, and when it ends. In most of the commercial countries abroad, it is particularly expressed, either in their ordinances or policies, and sometimes in both, that the risk of the insurers shall commence the moment the goods quit the shore, and shall continue till they are landed at the place of their destination: and that the insurer not only runs the risk in the ship named in the policy, but also in all the boats or lighters, that shall be employed in carrying the goods aboard, and also in fetching them ashore. But the custom of this country is very different, for the *English* policies expressly declare, that "the adventure shall begin upon the said goods and merchandizes "*from the loading thereof on board the said ship*, and so shall "continue until the said ship, goods, and merchandizes shall "be arrived at L. and upon the said ship until she hath "moored at anchor 24 hours in good safety; and *upon the "goods till the same be there safely discharged and landed.*" From these words, it is obvious, that insurers are not answerable for any accidents, which may happen to the goods in

Vide Appendix, No. 1. As to continuance of the risk *upon the ship*, see c. 2.

 lighters

lighters or boats going aboard *previous* to the voyage; yet as the policy says, the risk shall continue *till the goods are safely landed*, it seems no less obvious, that where ships cannot come close to the quay in order to unload, the insurer continues responsible for the risk to be run in carrying the goods in boats to the shore. If there be a loss, however, in these cases, the accident must have happened while the goods were in the boats or lighters belonging to the ship; for then it is considered as a continuance of the same ship and voyage. But in a case where the owner of the goods brought down his own lighter, received the goods out of the ship, and before they reached land, an accident happened, whereby the goods were damaged, a special jury of merchants, under the express direction of Lord Chief Justice *Lee*, found that the insurer was discharged, although the insurance was upon goods to *London, and till the same shall be safely landed there.*

Sparrow v. Carruthe 2 Stra. 1236.

In a late case in the Court of Common Pleas, that of *Sparrow* v. *Carruthers*, appeared to be considerably shaken (*a*.) The policy was in the usual form, "from *Petersburg* to *London*, "on goods till *they should be there discharged and safely landed.*" The cause was tried before Lord *Eldon*, Chief Justice, when it appeared that the ship and goods arrived in safety in the river *Thames*. That the plaintiffs being the consignees of the

Hurry and others v. The Royal Exch. Assurance, 2 Bos. & Pull. 430.

(*a*) In a still later case, *Strong* v. *Natally*, 1 *New Rep.* 16., Mr. Justice *Rooke*, one of the learned Judges, who decided that of *Hurry* v. *The Royal Exchange Company*, denied that the Court intended to shake the authority of *Sparrow* v. *Carruthers*; but to decide it upon its own circumstances, and the case of *Strong* v. *Natally* was decided upon the authority of *Sparrow* v. *Carruthers*, as not distinguishable from it. In this latter case, on the arrival of the goods insured, they were put on board a lighter hired in the usual way, and brought to a wharf belonging to the plaintiff in the afternoon, but in consequence of the roughness of the weather could not be landed that evening. The lighterman finding he could not land the goods, asked the plaintiff whether he (the lighterman) should stay to see the cargo landed. The plaintiff said he need not do so, for that he would see to the landing himself. Accordingly the lighterman left the cargo alongside the wharf. In the course of the night, the lighter was sunk by unavoidable accident, and the goods were lost.

The Court held that the underwriters were discharged, the plaintiff having taken the goods into his own possession before they were landed, having the complete controul over them, and renounced all benefit under the policy.

goods

goods by their broker, employed and paid a lighterman belonging to one of the public lighters, entered at *Waterman's Hall*, to land the cargo, which was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the *Russian* trade to land their goods by means of lighters; and that there are no other lighters now in use among the merchants but the public lighters. A verdict was given for the plaintiffs, with liberty to the defendants to move for leave to enter a nonsuit, upon the ground that the insurers were discharged by the delivery of the cargo to the lighters employed and paid for by the plaintiffs.

The case was argued, and the three learned Judges of that court (*Heath*, *Rooke*, and *Chambre*, Justices) were of opinion, that the insurers were not discharged. In giving their opinions they relied upon the words of the policy and the usage of trade, it being impossible for large vessels to come up to the wharfs to deliver their goods; and these lighters are *public* lighters, publicly registered, and equally known both to the underwriters and owners of the goods. All the judges expressly said, they did not wish to interfere with the case of *Sparrow* v. *Carruthers*, but they relied upon the distinction between public and private lighters, a distinction which, it seems, had been previously taken at *Nisi Prius*, in a case of *Rucker* v. *The London Assurance Company*, by the late very learned Mr. Justice *Buller*, and which distinction had never been questioned by any appeal to the court against that Judge's opinion.

See this case in 2 Bos. & Pull. 432. note (a).

Lord *Eldon* having been promoted to the office of Lord High Chancellor, was not present when this case was decided; but having been counsel in the cause at the trial, I ought to state that His Lordship at that time appeared to me to entertain the same sentiments with those of the learned Judges who ultimately decided it. (*a*)

By

(*a*) In an insurance on *goods* on board a Spanish ship from *Nassau* to *Campeachy*, and back, till *discharged and safely landed*, and the ship having a licence from the *British* government at *Nassau*, and having sailed to *Campeachy*, and having arrived off that port made signals for launches to

come

By the ordinances last referred to, the number of days, in which people are obliged to unload their goods, is stipulated; but in *England* no express time is fixed, the owners being left to their own discretion, provided there is no unreasonable delay, which must always depend upon circumstances.

See post, ch. 2. Noble v. Kenoway.

The risk on the body of a ship, according to the form of the policy received in practice, is to commence in general "at and from * , and so shall continue and "endure *until the said ship shall arrive at* , "and hath there been moored at anchor twenty-four hours in "good safety."

1 Magens, 47.

When insurance is made indeed on the homeward risk, the beginning of the adventure is sometimes stated to be "imme-"diately from and after her arrival at the port abroad:" at other times, "from the departure;" and in short, it is so variable, that nothing certain can be said upon the point, depending as it always has, and always must, upon the inclinations of the insured, as expressed in the contract.

Sixthly, Of the various perils and risks, against which the underwriter insures. These must always be inserted in all policies, and indeed the words now used are so comprehensive, that in the opinion of *Molloy*, all those curious questions, which occasioned much debate and controversy among the lawyers of former days, are now finally settled. Be this as it may, it is certain, that there is hardly any event which the imagination can form, as likely, in the common course of things to happen to any ship, that is not amply provided for by the policies now used by underwriters. They undertake to bear "all perils of the seas, men of war, fire, enemies, "pirates, rovers, thieves, jettisons, letters of mart, and coun-"ter mart, surprisals, takings at sea, arrests, restraints, and "detainments of all kings, princes, and people, of what na-"tion, condition, or quality soever; barratry of the master "and mariners, and all other perils, losses, and misfortunes.

Book 2. c. 7. s. 7.

See the Appendix.

come out, into which the goods were put for the purpose of being run ashore: The Court thought the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade. *Matthie* v. *Potts*, 3 *Bos. & Pull.* 23.

"that

"that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, or any "part thereof (*a*)." But although the words, descriptive of the hazards run by the insurers, be so very large and comprehensive, it should seem that a great difference is to be made between the damage sustained by goods from injuries *on board* a ship, and that which occurs by external accidents; that the insurer is liable in the latter case cannot admit of a doubt, but as the former may proceed from the bad stowage of the goods, or from their being exposed to wet; and as they are neglects attributable to the master; the ship, and not the insurer, ought to be answerable. Upon this point, however, I find no case in the reports, and therefore I merely state what I conceive to be understood as the law upon the subject. In *Malyne* it is said, that if there be thieves on ship-board among themselves, the master of the ship is to answer for that, and to make it good, so that the insurers are not to be charged with any such loss, for he supposes the word "thieves" to mean *assailing thieves* only, for so he terms them. It is certain, that a modern statute gives some countenance to this idea, by the preamble to which it appears, that previous to the period of passing that act, the owners of the ship were liable to the proprietors of the goods for any embezzlement, secreting or making away with, of the goods, by the master or the mariners, or with their privity, to whatever amount the value might be: by that statute, however, the measure of the responsibility is to be the value of the ship and freight (*b*). To be sure, it is not a necessary consequence, that because the owner is liable in such a case, therefore the insurer, if an insurance has been made, must be discharged, especially as the underwriter expressly undertakes, by the terms of the policy, to answer for the barratry of the master and mariners.

1 Magens, 50.

Malyne, c. 25. Lex Merc. Red. 4th edit. p. 295.

7 Geo. 2. c. 15.

(*a*) It has been held that a loss arising from rats eating holes in the bottom of the ship is not within any of these perils enumerated in the text. *Hunter* v. *Potts*, 4 *Campb.* 203. So of a ship destroyed by worms it is not a loss by perils of the sea. *Rhol* v. *Parr*. See *post*.

(*b*) By a subsequent statute, 26 *Geo.* 3. c. 86. the owner's responsibility is limited to the value of the ship and freight, even in cases of *external* robbery, without the privity of the masters or mariners, and by the 2d section, owners are wholly exempted from any loss occasioned by fire.

Roccus,

Roccus, however, is of opinion, that when a theft is committed *on board* the ship, and some goods have been stolen, then the insurers are not bound, because the owner of the goods, as much as in him lies, is obliged to take care of them; and if they are stolen, while in the vessel, this cannot be called an *accident*, but has happened through the *negligence* of those, who did not take proper care of them. He adds, that the master or owners being liable, is an additional reason for this regulation, because the master of the ship is held answerable for thefts committed therein, as by receiving the goods on board, he enters into a tacit agreement to deliver them safe and whole. It was thought proper thus to state the opinion of this learned writer upon the subject, the law of *England* in this respect being silent; though his reasoning upon this subject is by no means conclusive as to *English* insurances, on account of the express terms of the contract. Roccus de assecurationibus, Not. 42.

But that the underwriter is liable for a robbery of the goods insured, when committed by thieves, from without, cannot be doubted; as thieves are a peril expressly insured by the policy. (*a*) Harford v. Maynard, bef. Lord Mansfield at Guildhall, Hil. Vac. 1785.

In addition to the various risks above enumerated, which the underwriters take upon themselves, it is the general practice, to insure *lost or not lost*, which is certainly very hazardous; because if the ship or goods should be lost at the time of the insurance, still the underwriter, provided there be no fraud, is liable. The premium is, however, in proportion, depending upon the circumstances stated to shew the probability or improbability of the ship's safety. These words "*lost or not lost*," are peculiar to *English* policies, not being inserted in the policies of foreign nations. Molloy, b. 2. c. 7. s. 5. Roccus, No. 51. 5 Burr. 2802.

There is one case, in which, by act of parliament, the underwriters are prevented from paying upon certain of the risks mentioned in the printed policies, and that is in insurances

(*a*) [It has been said that the conveying prisoners of war in the vessel insured does not necessarily increase the risk. *Toulmin* v. *Anderson*, 1 *Taunt.* 227.]

upon cargoes of slaves. The acts of parliament upon this subject are annual acts, for regulating the shipping, and carrying slaves in *British* vessels from the coast of *Africa*: but they have now been continued for several years, and on account of the benefits derived to the slaves from the humanity of those provisions, are likely to be continued (*a*). With a view, therefore, to procure better treatment, when in health, and a greater degree of care and attention when in sickness, for the objects of this traffic, the legislature has provided, that though the usual printed words may remain on the face of the policy, that no loss or damage shall hereafter be recoverable on account of the *mortality* of slaves *by natural death or ill treatment*, or loss *by throwing overboard* of slaves on any account whatever, or loss or damage by restraints and detainments, by kings, princes, people, or inhabitants of *Africa*, where it shall be made appear that such loss or damage has been occasioned through any aggression for the purpose of procuring slaves, and committed by the master of any such ship or by any person or persons commanding any boat or boats, or party or parties of men belonging to any such ship, or by any person or persons acting by the direction of any such master or commander respectively.

34 Geo. 3. c. 80. s. 10. continued by 39 Geo. 3. c. 80. s. 24, 25.

Seventhly, The consideration or premium for the risk or hazard run: this is the most material part of the policy, because it is the consideration of the premium received that makes the underwriter liable to the losses that may happen. In *English* policies it is always expressed to have been received at the time of underwriting; "we the assurers confessing ourselves "paid the consideration due unto us for this assurance by the "assured."

(*a*) When the insurances made upon slaves prior to *May* 1807, shall have expired, no question of law can ever arise on that subject again; for by an act passed 47 G. 3. c. 36. the African slave trade is utterly abolished, from the 1st of *May* 1807, and the 5th s. of the act prohibits all insurances respecting slaves, declaring them unlawful, under a penalty of 100l. and three times the amount of the premium. But the 6th s. declares that no insurance shall be void made upon this subject, provided the vessel shall have been cleared out from *Great Britain* before the 1st of *May* 1807, and the slaves be finally landed in the *West Indies* before the 1st of *March* 1808, unless prevented by capture, the loss of the vessel, the appearance of an enemy on the coast, or other unavoidable necessity, the proof whereof to lie on the party charged.

"assured." This being subscribed by the underwriter, it is proper to enquire whether, if the premium were not actually paid at the time, he could afterwards maintain an action for it against the *assured*, who might then produce his subscription, as evidence against himself. One old case has been found upon the subject, but that is by no means satisfactory. It was an action of assumpsit, and the plaintiff declared that the defendant was indebted to him in twenty pounds, for a premium upon a policy of insurance on such a ship. The defendant demurred *specially*, because the plaintiff did not shew the consideration certainly, what the premium was, or how it became due: but the objection was not allowed, for this is as good as an *indebitatus pro quodam salario*, which has been adjudged good. Here, however, is no decision upon the merits, nor does it appear whether the defendant was the broker or the insured himself. It is true, in practice, policies in general are effected by the intervention of a broker; and by the usage of trade, open accounts are kept between the insurers and brokers, in which case the underwriter may have an action against the broker for premiums received to his use. In one case, indeed, the question did arise, though nothing was done upon it.

Fowk v. Pincacke, 2 Lev. 153.

It was an action by the insurer against the owners, who in this case acted, without the intervention of a broker, for money had and received to his use. The case was decided upon other grounds, for which it will be mentioned more at length hereafter; but just before the verdict was given, it was objected, that this action would not lie for premiums against the *insured themselves*. Lord *Mansfield*, however, thought the objection came too late, and would not, at that stage of the cause, when the jury were ready to give their verdict, enter into it.

Gist v. Mason, Mich. Vac. 1785. at Guildh.

In an action brought by the assignees of a broker against the assured, for premiums paid by the bankrupt to the underwriters, the question cam collaterally before the court: but I do not find that any point was reserved, and the verdict was general. However, upon all the cases it seems that the broker alone is the debtor to the underwriter.

Airy and others, Assignees of Milton, v. Bland, Trin. Sitt. at Guildhall, 14 Geo. 3.

It was an action brought by the plaintiffs, as assignees of *Milton*, who was a broker at *Newcastle*, and who had procured an insurance to be effected by different persons for the defendant. The declaration stated, that in consideration that the bankrupt would procure an insurance to be made on the ship *Jason*, and would procure six hundred pounds to be insured thereon by good and sufficient persons, the defendant promised that he would pay the bankrupt the premiums, and a reasonable sum for his trouble. The first question was, whether credit was given by the underwriters to the assured or to the broker, where the premium was not paid down at the time the assurance was made. *Milton*, the bankrupt, swore, that in *May* 1764, he was told by the underwriters that they should look upon him as their debtor, and that they would have nothing to do with the insured, which was considered at *Newcastle* as the *London* practice: that from that time he had always acted on this plan, and had paid, since that time, one thousand pounds to underwriters, which he had never received. His commission was *five per cent*. *London* insurance brokers were then called, who said, they understood the underwriters looked to them only; and that the underwriters did not once in ten times know who the insured were; and that in case of failure, the underwriter came upon the effects of the broker; the broker upon those of the insured.

Lord *Mansfield* said,—"The plaintiff's case is stronger than referring to the general usage in *London*; for they act by a specifick rule, which they suppose to be the rule in *London*: and if the usage in *London* were doubtful, still the plaintiffs would be entitled to recover."—There was a verdict for the plaintiffs.

The two following cases will tend to illustrate the doctrine contained in the above case:

Edgar v. Bumstead, 1 Campb. 411.

The first of them was an action of assumpsit for money had and received. The principal item in dispute between the parties, was a sum paid by the plaintiff to the defendant under the following circumstances:

The

The plaintiff being an insurance broker, got a policy underwritten for the defendant, a merchant, on the ship *Alfred*, which was subscribed (among others) by one *Lomas*. A loss happened; whereupon the plaintiff paid the full amount of the sum insured to the defendant. Previously to this, *Lomas* had become insolvent, without the plaintiff being aware of the fact; and it was now contended, that he had a right to recover the sum he had paid to the defendant in respect of *Lomas's* subscription, as money paid under a mistake of the fact. But Lord *Ellenborough* held, that on account of the well known course of dealing between the insurance broker, the merchant, and the underwriter, the money could not, under these circumstances, be recovered back from the assured.

It has also lately been decided, that in an action by the assured against an underwriter to recover the premium, the policy subscribed by the defendant is conclusive evidence that he has received the premium. This was held in an action for money had and received, tried at *Guildhall*. The defendant had underwritten a policy of insurance effected by one *Reid*, an insurance broker, on account of the plaintiff, upon goods by ship or ships, at and from *Berbice* to *Great Britain*. This action was brought to recover back the premium, on the ground that the goods had never been shipped. Dalzell v. Mair. 1 Campbell 532.

The plaintiff gave in evidence the policy signed by the defendant, which contained the usual acknowledgment on the part of the underwriters, "*confessing ourselves paid the consideration due unto us for this assurance by the assured*," &c. It appeared, however, that no money had really been paid in respect of the insurance in question. The plaintiff being the holder of a bill of exchange accepted by *Reid*, which was not paid when due, the latter proposed by way of satisfaction to get policies of insurance under-written for him. This policy was effected in consequence; and *Reid* having a running account with the defendant, had not paid him any part of the premium at the commencement of this action.

It was contended, that under these circumstances the action would not lie, as no money had been received by the defendant

fendant either from the plaintiff or *Reid*, or paid by the plaintiff either to *Reid* or the defendant.

Lord *Ellenborough*.—The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a sum of money from the broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him (*a*). I should completely knock up the insurance business, if I were to allow this acknowledgment to be impeached. It is well known that there are running accounts kept between the insurance broker and the underwriter; and Lord *Kenyon* held that the former, before paying premiums to the latter, might maintain an action against the assured to recover the amount of them as for money paid.

P. 524 Mr. *Campbell* adds in a note upon the last case, that he had not been able to find any decision of Lord *Kenyon's* upon this point: but that learned reporter refers to the case of *Airey* v. *Bland*, and then adds a very acute and sensible observation, "that the object of the formal acknowledgment of the receipt of the premium inserted in the policy is probably to preclude the necessity of proving it when a loss happens, and to prevent the underwriters from objecting, that there "was a want of consideration for their promise, in case the "broker has not paid them. The receipt is no bar to an action for the premium by the underwriter against the broker; "and the distinction seems to be this, that as between these "parties it is no evidence at all, but that as between the "underwriters and the assured it is conclusive. It follows "as a consequence from this decision, that an action cannot be maintained for premiums of insurance by the underwriters against the assured, which has hitherto been "*vexata questio*."

De Garnard v. Pigou, 4 Taunt. 247. And therefore in an action by the assured for a total loss against the underwriter, the latter cannot, as against the

(*a*) [Yet where it appears that a fraud has been practised upon the underwriter in collusion between the broker and assured, he may maintain the action, notwithstanding the receipt on the policy. *Foy* v. *Bell*, 3 *Taunt.* 493. and *Mavor* v. *Simeon*, 3 *Taunt.* 497.]

assured,

assured, set off the premiums, although they have never been paid to him by the broker.

In a late case, the question of credit for premiums between the broker and underwriter, arose in an action brought by the assignees of a bankrupt underwriter against the brokers for premiums supposed to have been received by the latter from the assured for policies which they (the brokers) had procured the bankrupt to subscribe as an underwriter. For these very premiums the brokers had given the underwriter credit in their account with him, and had again taken credit for them in their account with the assured. The counsel in the cause, the very learned judge, (Mr. Justice *Le Blanc*,) before whom it was tried, and Lord *Ellenborough* and the other Judges of the Court of King's Bench, before whom it was brought upon a case reserved for their opinion, never seem to have doubted, *that the underwriter may maintain an action directly against the broker for premiums.* But that case was decided, as to the main point, in favour of the broker, because the premiums in question were for re-assurances, which are illegal by the 19 G. 2. c. 37. and which the broker had not *in fact* received from the assured, but only credit for them had been given in account between the broker and underwriter.

Edgar and another, assignees of Carden v. Fowler and another. 3 East's R. 222.

The relative situation, in which broker, assured, and underwriter stand to each other, has been more frequently discussed of late years upon questions of premium, on account of several failures, which made the decision of these points of consequence to their respective estates.

A question of this nature arose about 1786, when it was held that in an action by the assignees of a bankrupt underwriter against the broker, for premiums of insurance upon policies underwritten by the bankrupt *for the broker in his own name*, the broker having a *del credere* commission from his principal, might set off under the general issue upon the statute of 5 G. 2. respecting mutual credit, losses which had happened *before* the bankruptcy, and for which premiums the underwriter had debited the broker.

Grove v. Dubois, 1 T. R. 112.

Bize v. Dickason, 1 T.R. 287. And see 19 G. 2. c. 32.

This doctrine was soon after extended to a case, where, though the loss had happened *before*, the adjustment did not take place till *after* the bankruptcy.

These two cases have since been considerably shaken.

Shee v. Clarkson, 12 East, 507.

In the next case, the Court of King's Bench held, that as the broker is the mutual agent both of the assured and underwriter, while the premium remains in his hands, for the use of the underwriters, if he receive notice of an event entitling the assured to a return of premium, before any action brought against him for the whole of the premium, he is entitled to deduct such returns, and only to pay over the difference to the underwriter, he never having parted with the policies. In this case there was no bankruptcy, and of course no question about mutual credit.

See Ld. C.J. Mansfield's opinion, 4 Taunt. 248.

Minett, Assignee of Barchard, v. Forrester, 4 Taunt. 541.

But in the next case, a bankruptcy had happened, and the Court of Common Pleas were clearly of opinion, that the broker is the agent for both parties; first, for the insured in effecting the policy, and in every thing that is to be done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else: and that when once a bankruptcy had taken place, the broker cannot in any sense be said to be an agent for the underwriter, as the authority given by the underwriter himself ceases after his bankruptcy; and when he became a bankrupt, his right to the premium was immediately communicated to his assignees. That Court therefore held that an insurance broker indebted to a bankrupt underwriter for premiums, cannot without some special authority, set off against that debt sums due to the assured for return of premium, whether those returns became due after or before the bankruptcy. And relying on the above decision, they decided accordingly, as to returns of premiums for arrival, which had taken place after the bankruptcy.

Goldschmidt v. Lyon, 4 Taunt. 534.

Glennie and others, Assignees, v. Edmunds, 4 Taunt. 775.

In a subsequent case, where an action was brought by the assignees of an assured, who had become bankrupt, and who always acted as his own broker, for a total loss, the underwriter was not allowed to set off as a mutual credit, premiums due from the bankrupt upon that and other policies. It does

not appear that the statute of 19 G. 2. c. 32. which enables assured to claim against bankrupt underwriters, as if the loss had actually happened, was observed upon at the bar. Supposing both parties had become bankrupts, the assignees of the assured could have claimed the loss against the estate of the underwriter. Would not the equity of the same statute have allowed the premiums to be set off: and as no broker intervened in this case, may it not be considered that this is strictly a case of mutual credit?

See Graham v. Russell, B. R. Michaelmas, 57 G. 3.

In an action by the assignees of an underwriter against insurance brokers for the balance of an *adjusted* account, and also for premiums due to the bankrupt upon policies underwritten before the bankruptcy, the brokers are not entitled to deduct for returns of premium, which formed a part of the adjusted account, but where the events entitling them to the return were not known till after the adjustment — neither can the brokers deduct for returns of premium on policies, for the premiums of which the action is brought, the events entitling them to which returns happened before the bankruptcy, but were not adjusted; neither can they deduct where the events happened since the bankruptcy, but before the commencement of the action, the brokers having neither a *del credere* commission, (a circumstance which we shall presently see, the Court considered as making no difference,) nor being personally interested in the insurance. In giving the judgment, the Court expressly founded it upon a conformity to that of *Minett, assignee of Barchard*, v. *Forrester*, in the Court of Common Pleas (*supra*, p. 40.)

Parker, Assignee of Parker, v. Smith, 16 East, 382.

In *Grove* v. *Dubois* and *Bize* v. *Dickason*, there was a *del credere* commission, a fact much pressed in the case about to be quoted: but Lord *Ellenborough* said in giving judgment, he could not conceive how a contract between *A.* and *B.* can vary the rights between *B.* and a third person who is a stranger to it, and empower *B.* to set up a claim against him as derived out of that contract. And therefore the Court decided that where a broker effected policies *in the name of his principal under a del credere* commission, he could not set off against an action for the premium, total losses which happened on those policies, although the broker had accounted for them with his principal.

Cumming v. Forrester, 1 M. & S. 494.

In

In this last case there was no bankruptcy, and Lord *Ellenborough* also observed that in *Grove* v. *Dubois* the policy was filled up in the name of the broker, and the whole dealing was between the broker and the underwriter.

Kostei, Assignee of Swan, v. Eason, 2 M. & S. 112.

He also made a similar observation in the case about to be quoted, where the Court of King's Bench held, after time taken to deliberate, that in an action brought by the assignees of a bankrupt underwriter, the broker could only set off such losses and returns as were due on policies effected in the broker's own firm, such losses and returns having become due on those policies before the underwriter stopped payment, though never adjusted by the bankrupt, and for the amount of which losses and returns the broker had given their principals credit. But the Court also decided that the broker could not set off, where the policies were effected in the name of the principals themselves, though the broker had a *del credere* commission.

Parker v. Beasley, 2 M. & S. 423.

And in a subsequent case, the Court of King's Bench, adopting the distinction just made, decided that where brokers effected policies on goods on account of their principals, *but in their own names*, and accepted bills drawn on them on the goods, which were consigned to them, and lost before their arrival, held, that the broker might set off such losses against the assignees of the bankrupt underwriter, though there was no commission *del credere*, nor any adjustment.

The main point in all these cases is, that bankruptcy determines agency, and vests all the bankrupt's rights in the assignees; and that the broker acting under a *del credere* commission cannot be in any other situation with respect to a third person than he would be without it: but that wherever all the dealings are between the underwriter and broker as principal, and the underwriter knows him in no other character, there the rights of a principal attach upon him.

Houston, Executor, v. Robertson, 2 Marsh. 138.

Lately the Court of Common Pleas, in conformity to the principle of all the above decisions, held that death was to be put on the same footing as bankruptcy; and that as the bankruptcy in the one case caused the authority of the agent to

 cease,

cease, so did death in the other. The interests in the one case became vested in the assignees; in the other in the executors. And therefore they held, that in an action by the executors of an underwriter against a broker for premiums due on policies subscribed by their testator, the broker could not set off returns of premium which became due after the death of the testator.

Eighthly, The day, month, and year, on which the policy is executed. This insertion seems very necessary, because by comparing the date of the policy with the date of facts which happen afterwards, or are material to be proved, it will frequently appear, whether there is any reason to suspect fraud or improper conduct on the part of the insured. 1 Mag. 84.

The ninth and last requisite of a policy of insurance is that it be duly stamped.

By several acts of parliament passed in this and the preceding reigns, various duties had been imposed upon policies of insurance; but by an act passed in the 35th year of *Geo.* 3. for the purpose of imposing a new duty on marine insurances, it was by the 24th section of the statute positively declared, that all former duties on that species of insurance should, from and after the 5th day of *July* 1795, cease and determine, and be no longer paid or payable. By the 2d section of the act it is declared that the duty thereby imposed shall not extend, or be construed to extend, to insurances on lives or insurances from losses by fire. 35 *Geo.* 3. c. 63.

"For every skin, or piece of vellum or parchment, or sheet "of paper, on which any insurance upon any ship or ships, "goods or merchandize, or upon any other property, or interest whereon insurances may lawfully be made, shall be "engrossed, written or printed, the stamp duties following "upon the sums insured; that is to say, Where the sum to "be insured shall amount to one hundred pounds a stamp "duty of two shillings and sixpence, and so progressively for "every sum of one hundred pounds insured; and where the "sum to be insured shall not amount to one hundred pounds, "a like stamp duty of two shillings and sixpence; and where "the Section 1

" the sum to be insured shall exceed one hundred pounds, or
" any progressive sums of one hundred pounds each, by any
" fractional part of one hundred pounds, a like stamp duty
" of two shillings and sixpence for each fractional part of
" one hundred pounds: And that upon all and every in-
" surances or insurance, where the premium, or consideration
" in the name of a premium, actually and *bonâ fide* paid,
" given, or contracted for, shall not exceed the rate of ten
" shillings, there shall be paid the following duties; (that is
" to say,) where the sum so to be insured shall amount to one
" hundred pounds, a stamp duty of one shilling and three-
" pence, and so progressively for every sum of one hundred
" pounds so insured; and where the sum so to be insured shall
" not amount to one hundred pounds, a like stamp duty of
" one shilling and three-pence; and where the sum so to be
" insured shall exceed one hundred pounds, or any pro-
" gressive sums of one hundred pounds each, by any *frac-*
" *tional* part of one hundred pounds, a like stamp duty of
" one shilling and three-pence for such fractional part of one
" hundred pounds; which several duties shall be payable and
" paid by the assured in such assurances respectively."

Section 4. " Provided always, and be it further enacted, That upon
" all and every such insurances or insurance, where the pre-
" mium, or consideration in the nature of a premium, actually
" and *bonâ fide* paid, given, or contracted for, shall not ex-
" ceed the rate of ten shillings *per centum* on the sum insured,
" it shall be lawful, in all cases where the sum insured shall
" amount to two hundred pounds or upwards, to use stamps
" of two shillings and sixpence for every two hundred pounds,
" of the sum insured, instead of stamps of one shilling and
" three-pence for every one hundred pounds of the like sums
" so insured."

Section 11. " And be it further enacted by the authority aforesaid,
" That every contract or agreement which shall be made or
" entered into for any insurance, in respect whereof any duty
" is by this act made payable, shall be engrossed, printed, or
" written, and shall be deemed and called, *A Policy of In-*
" *surance*; and that the premium, or consideration in the
" nature of a premium, paid, given, or contracted for, upon
" such

"such insurance, and the particular risque or adventure in-
"sured against, together with the names of the subscribers
"and underwriters, and sums insured, shall be respectively
"expressed or specified in or upon such policy, and in de-
"fault thereof every such insurance shall be null and void
"to all intents and purposes whatever." (a)

"And be it further enacted by the authority aforesaid, "That no policy of insurance upon any ship, or upon any "share or interest therein, shall be made for any certain term "longer than twelve calendar months; and every policy "which shall be made for any longer term shall be null and "void to all intents and purposes." Section 12.

The 10th section of the statute provides for an allowance to be made under certain circumstances by the commissioners, where the sums insured on homeward voyages shall be found to exceed the interest of the assured. Section 10.

The 13th section provides that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or Section 13.

(a) In a late case it appeared to be usual for the underwriters at *Lloyd's* Coffee House, to put down upon a slip of paper all the risks they had taken in the course of the day: and one of the special jury said, they considered the party as bound by that slip, though he never signed a policy. Rogers v. M'Carthy, Sittings after Hil. Term 1800.

But Lord *Kenyon* said, that whatever obligation there might be in honour and good faith, he certainly would not be bound in law, for in order to enforce the claim of the assured in a court of justice, he must produce a *stamped policy*.

And in a still later case, the defendant being desirous of shewing that another underwriter had subscribed the *slip* first, although the defendant's name appeared first on the policy: Lord *Ellenborough* held at the trial, and the Court afterwards concurred with him, that the slip not being stamped could not be received in evidence, to contradict the written contract between the parties. Marsden v. Reid, 3 East's Rep. 572.

contracted

contracted for, shall exceed the rate of 10*s. per cent.* on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, (see sect. 12.) and so that no additional or further sum shall be insured by reason or means of such alteration. (*a*)

Two cases have recently occurred on this clause of the stamp act. In the first, *Kensington* v. *Inglis* and another in error from the Court of C. P. 8 *East's Rep.* p. 273. goods and specie had been insured on ship or ships, which should sail between the first of *October* 1799 and the first of *June* 1800; a memorandum written on the policy on the 11th of *June* 1800, extending the time of sailing to the 1st of *August* 1800, does not require a new stamp, such alteration being protected by the 13th sect. of the 35 *Geo.* 3. c. 63.: for although the first of *June* was passed at the time when the alteration was made, the Court of K. B. unanimously held, that the words, "so that the alteration be made before the "determination of the risk originally insured," meant such a determination of it, as is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage, and there was no new subject of insurance introduced by the alteration.

But in the other case, decided in the subsequent term, *Hill* v. *Patten*, 8 *East's Rep.* p. 373., an action was brought on an insurance on *ship and goods* on a voyage on the Southern whale fishery, an alteration, by consent, after the ship sailed

Ridsdale v. Shedden, 4 Campb. 107. (*a*) A policy containing a warranty that the ship shall sail on or before a given day, may be altered pending the risk, by a memorandum cancelling the warranty, without a fresh stamp. *Hubbard* v. *Jackson*, 4 *Taunt.* 169. is to the same effect, and also that altering the mark on goods requires no new stamp.

Robinson v. Touray, 1 M. & S. 217. So a mistake made by the agent in declaring the interest in the margin of the policy to be on a ship by a wrong name, may be rectified without a fresh stamp.

Sawtell v. Loudon, 5 Taunt. 359. and 1 Marsh. 99. If the declaration of interest in a policy of insurance be altered by striking out the words *on ship*, and inserting the words "*on goods as interest may appear*," and the insured really have no interest in the ship, it requires no new stamp.

and

and the risk attached, having been made from an insurance on the *ship and outfit* to an insurance on *ship and goods*, cannot be made without a new stamp the subject-matter being essentially different, and therefore not falling within the 13th sect. of the stamp act. But the Court said, it was not from their decision to be inferred that shifting successive cargoes on board the same ship, as in the *African* and other trades out and home may not properly be the subject of insurance under the word *goods*. This declaration contained but one count, namely, upon the altered policy; and Mr. *Hill* having become a bankrupt, his assignees brought another action, stating the policy as in its unaltered state; and contended that they had a right to recover, reading the policy as it originally stood. But the alteration being inserted in the body of the policy, Lord *Ellenborough* held that the alteration subsequent to the original subscription to the policy rendered it void, not being re-stamped, and the Court, after much argument, upon a motion for a new trial, confirmed His Lordship's opinion. The name of the cause was *French* v. *Paton*, East. Term, 48 G. 3. See 1 *Campb. Nisi Prius*, p. 72., and 9 *East*, 351. *Cole* v. *Parkin*, 12 *East*, 471., and *Langhorn* v. *Cologan*, 4 *Taunt.* 330.

By this section, a penalty of 500*l.* is imposed both on the persons procuring, and the brokers effecting insurances on policies not duly stamped; and the latter can neither demand their brokerage, nor the money expended for premiums; and by the 17th section, every underwriter subscribing such illegal policy is also liable to a like penalty of 500*l.*

Section 15.

Section 16.

By a subsequent statute, engrafted upon the 14th section of the preceding act, additional duties are imposed; if the separate interests of two or more distinct persons shall be insured by one policy or instrument, a duty shall be charged thereon in respect of each and every fractional part of 100*l.* as well as in respect of every full sum of 100*l.* which shall be thereby insured upon any separate and distinct interest.

48 G. 3. c. 149. Schedule Policy of Assurance.

And in a case, where it appeared there was no fraud, the Court were obliged reluctantly to come to the conclusion, that if several interests included fractional parts of 100*l.* which interests

Rapp v. Allnutt, 15 East, 601.

terests were afterwards declared and indorsed on the policy, such policy cannot (by virtue of sect. 14. of the 35 G. 3. c. 63.) be given in evidence, nor is available in law to any extent, unless stamped with a stamp of sufficient value to cover all such fractional parts, though it were sufficient to cover the entire sum insured.

Ord. of France, art. 69. Tit. Assurance.

By the ordinances of *France* and other maritime countries, all policies of insurance must be registered; but no such regulation prevails in *England*, either by law, or in practice.

CHAPTER II.

Of the Construction of the Policy.

A POLICY of insurance, being a contract of indemnity, and being only considered as a simple contract, must always be construed, as nearly as possible, according to the intention of the contracting parties; and not according to the strict and literal meaning of the words. The mercantile law, in this respect, is the same in every part of the world; for from the same premises, the sound conclusions of reason and justice must ever be the same (*a*). Thus as the benefit of the insured, and the advancement of trade, are the great objects of insurance, policies are to be construed largely, in order to attain those ends; for it would be absurd to suppose that when the *end* is insured, the ordinary and usual means of attaining it can possibly be excluded; whatever, therefore, is done, by the master of the ship, in the usual course, necessarily, *et ex justâ causâ*, although a loss happen thereon, the underwriter shall be answerable.

1 Burr. 347. Roccus Not. 18.

1 Burr. 348.

But in the construction of policies, no rule has been more frequently followed than the *usage* of trade, with respect to the particular voyages or risks to which the policy relates: and in the cases about to be quoted in support of these principles, it will be found, that the learned judges have always called in the usage of trade, as one of the grounds upon which the construction turns.

(*a*) The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average and total loss, or to money expended, or labour bestowed about the defence, safeguard, and recovery of the ship, to a much greater amount than the subscription. See *Cheminant* v. *Pearson*, 4 *Taunt.* 367.

In stating the different cases upon this subject, as the point is nearly the same in all, the order of time, in which they were determined, is that which will be pursued, in order to prevent confusion.

Anonymous, Skinn. 243.

The first to be mentioned is an anonymous case in the time of *James* the Second; but it is from a reporter of very good authority. A policy of insurance shall be construed to run until the ship shall have ended, and be discharged of her voyage; for arrival at the port to which she was bound is not a discharge *till she is unloaded:* and it was so adjudged by the whole court upon a demurrer.

But although this construction may be perfectly right, where the policy is general from *A.* to *B.* yet if it contain the words usually inserted, "*and till the ship shall have moored at anchor* "*twenty-four hours in good safety,*" the underwriter is not liable for any loss, arising from seizure after she has been twenty-four hours in port; though such seizure was in consequence of an act of barratry of the master *during the voyage*, for if it were extended beyond the time limited in the policy, it would be impossible to lay down any fixed rule, and all would be uncertainty and confusion.

Lockyer and others v. Offley, 1 Term Rep. p. 25

This was decided in an action on a policy of insurance on the ship *Hope* from *Hamburgh* to *London*, subscribed by the defendant for two hundred pounds, at one guinea *per cent.* At the trial before Mr. Justice *Buller*, at *Guildhall*, a verdict was found for the plaintiffs, subject to the opinion of the court, upon the following case: that the plaintiffs were interested in the ship to the amount of the sum insured. That in the course of the voyage the master committed barratry, by smuggling on his own account, by hovering, and running brandy on shore in casks under sixty gallons. That on the first of *September* 1785, *the ship arrived in safety at her moorings in the river Thames, and remained there in safety till the twenty-seventh of the said month of September*, when she was seized by the revenue officers for the smuggling before stated. That about three weeks after the seizure, the plaintiffs informed the underwriters thereof; and that they would hold them liable on the policy. That on the twentieth of *October*, the

the plaintiffs presented a petition to the commissioners of His Majesty's customs, in which they imputed all the blame (which was certainly the truth) to the captain, and praying that their vessel might be restored, on paying something to the seizing officer. The answer was, "that the prosecution "must proceed, as the ship had been guilty of a gross viola- "tion of the laws, but that the owners should be at liberty "to compound, according to the rules of the Exchequer." That the ship was appraised at the sum of three hundred and forty-five pounds, and by the course of the court of Exchequer, the ship would have been restored to the plaintiffs, upon the payment of two hundred and thirty pounds, besides costs and charges, which would altogether have amounted to three hundred and twenty-nine pounds nine shillings and seven-pence. That in *November* a notice was indorsed on the policy, binding the underwriters for all costs and charges expended about the recovery of the ship. That this was shewn to the underwriters, who refused to subscribe it.

This case was fully argued in the absence of Lord *Mansfield*, and the Court having taken time to deliberate, Mr. Justice *Willes* pronounced their unanimous opinion. "There "is no doubt in this case but that the master was guilty of "barratry, by smuggling on his own account, without the "privity of his owners. Many definitions of barratry are to "be found in the books, but perhaps this general one may "comprehend almost all the cases: barratry is every species "of fraud or knavery in the master of the ship, by which the "freighters or owners are *injured*; and in this light a cri- "minal or wilful deviation is barratry, if it be without their "consent. The general question here is, whether, as the "loss, which was occasioned by the barratry of the master, "did not happen *during the continuance of the voyage*, the "insurers are liable? I must own this appears to me to be a "novel question, and not to have been decided by any former "determinations. Difficulties occur on both sides in laying "down any rule. The first thing to be observed is, that the "policy, by the terms of it, is an undertaking *for a limited* "*time*, during the voyage from *Hamburgh* to *London*, *till* "*the ship has moored twenty-four hours in safety*; and the "ship was not actually seized till near a month afterwards.

 "But

"But it has been said, that under the 24th of *George* the "Third, chap. 47. and the excise laws, the forfeiture at- "taches the moment the act is done, and that the barratry "was committed *during the voyage.* It may be so as to some "purposes, as to prevent intermediate alterations or incum- "brances; but I think the *actual* property is not altered *till* "*after the seizure,* though it may be before condemnation. I "will put this case: suppose, before the seizure of the ship, "she had gone another voyage, and on her return had been "seized, would the crown be entitled to an account of her "earnings, after deducting the expences of the outfit? surely "not. Till the seizure it was not certain that the officers of "the crown knew of the illicit trade carried on by the "master, or whether they would take advantage of the for- "feiture. It would be a dangerous doctrine to lay down, "that the insurers should, in all cases, be liable to remote "consequential damages. This has been compared to a "death's wound received during the voyage, which subjected "the ship to a subsequent loss. To this point the case of "*Meretony* v. *Dunlop* seems very material. That was an in- "surance on a ship for six months; and three days before "the expiration of the time she received her death's wound, "but by pumping was kept afloat till three days after the "time: there the verdict, under the direction of Lord *Mans-* "*field*, was given for the insurer: and it was afterwards con- "firmed by the Court. I will put another case: suppose an "insurance upon a man's life for a year, and some short time "before the expiration of the term he receives a mortal "wound, of which he dies after the year, the insurer would "not be liable. The case of *Vallejo* v. *Wheeler* was cited for "the plaintiff, but that does not conclude this question, for "there the ship was lost *during the voyage.* It was also "argued, that this ship, even in the hands of a fair pur- "chaser, would be liable to the forfeiture. I do not know "that it ever has been so decided; it may depend on circum- "stances, such as length of possession, laches in seizing, or "other matters. But suppose the law to be so, it does not "follow from thence, that though the ship *is always liable to* "*confiscation*, that the insurer, at any distance of time, is "answerable for the loss, under a limited undertaking. And "this brings me to that part of the case, which weighs most "with

Easter, 23 Geo. 3. B. R.

Vide post, c. 5.

"with the Court, in favour of the defendant, and to which it "does not appear to us that any satisfactory answer has been "given. It was agreed in the argument, that the custom-"house officers might seize for the forfeiture within three "years after the fact committed; and that the attorney-ge-"neral might file an information at any time whilst the ship "was in being. Is the insurer during all this time to con-"tinue liable? Suppose the ship had gone several voyages "afterwards; and suppose a partial loss paid, and the un-"derwriter's name struck off, shall an action be afterwards "brought upon the policy? His accounts could never be "settled, nor could he be finally discharged, whilst the ship "was in existence; such a position would be monstrous, and "attended with infinite inconvenience. There must be some "certain and reasonable limitation in point of time laid down "by the Court, when the insurer shall be released from his "engagement. If he be liable for a month, he may be for a "year, and so on. We all think that the law of insurances "would be left unsettled, and in much confusion, if any "other time were allowed than that prescribed by the policy, "namely, *the continuance of the voyage, and the ship's mooring* "*twenty-four hours in safety.*"—Judgment for the defendant.

In an action upon a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, warranted to depart with convoy, the declaration shewed, that the ship went from *London* to the *Downs*, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clause, "warranted to depart with convoy," must be construed according to the usage among merchants, that is, from such place where convoys are to be had, *as the Downs.*

Lethulier's Case, 2 Salk. 443. See also Warwick v. Scott, 4 Campb. 62.

It is true, Lord Chief Justice *Holt* differed from the rest of the Court, being of opinion that it was no part of the law of merchants to take convoy in the *Downs*. His lordship's opinion, however, although it is one of the first legal authorities, is certainly contradicted by practice, it being almost the invariable custom for the convoy to meet the merchant ships only in the *Downs*.

See Gordon v. Morley, post.

Bond v. Gonsales, 2 Salk. 445. Case upon a policy of insurance, which was to insure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The case was, the galley set sail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks, they set sail from the *Texel*: the galley was separated in a storm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds salvage. It was ruled by *Holt* Chief Justice, that the voyage ought to be according to *usage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made,) there was no convoy for ships directly from *Bremen* to *London*.—Verdict for the plaintiff.

Waples v. Eames, 2 Stra. 1243. The ship *Success* was insured "*at and from Leghorn to the* "*port of London, and till there moored twenty-four hours in* "*good safety.*" She arrived the 8th of *July* at *Fresh Wharf* and moored, but was the same day served with an order to go back to the *Hope*, to perform a fourteen days' quarantine. The men upon this deserted her, and on the 12th of the month the captain applied to be excused going back, which petition was adjourned to the twenty-eighth, when the regency ordered her back; and on the thirtieth she went back, performed the quarantine, and then sent up for orders to air the goods: but before she returned, the ship was burnt on the twenty-third of *August*, and now the question was, whether the insurer was liable?

Lord Chief Justice *Lee* ruled, that though the ship was so long at her moorings, yet she could not be said to be there in *good safety*, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the regency taken time to consider the petition, there was no default in the master or owners: and it was proved, that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

So

So where the ship *Hercules* was insured from *Bilboa* to *Rouen*, and till 24 hours moored in safety there. The ship arrived, an embargo having been previously laid on all *English* vessels in that port. The captain went on shore the day he arrived, and the next day the embargo was laid on his ship. He was afterwards permitted to land his cargo, which he delivered to his consignees, but the ship was *detained as a prize*, and the captain and crew allowed subsistence as prisoners of war, from the time of their arrival. Minett v. Anderson, Peake. 211. Sitt. after Hil. 34 G.3.

Lord *Kenyon*.—"She was as much within the power of the enemy, as if a guard had been put on board the moment she arrived. She could not be said to be 24 hours, or a minute, *moored in safety*, so far as relates to these plaintiffs, for immediately on her entering the port, she was to all intents and purposes captured by the *French*."—Verdict for the plaintiffs.

Immediately upon the arrival of a ship at *Riga*, her papers were taken, and hatches sealed down, by order of government, till her papers could be sent to *St. Petersburg* to be examined: after which, ship, *&c.* were condemned for carrying simulated papers, the court held, this vessel could not be said to be *moored* in good safety, and the underwriters would have been liable: but as the assured carried simulated papers without leave, the assured could not recover. Horneyer v. Lushington, 15 East, 46.

But where a ship had arrived at the wharf, where she intended to unload, on the 12th of *January*, and was laid on the outside of the tier, there being no room to lay her in the inside; where the sails were unbent, topmasts struck, three anchors out, and she was also lashed to another ship, and so continued till the 19th, when several ships and a quantity of ice drove athwart her stern, forced her adrift, and she was wholly lost: Lord *Kenyon* was of opinion, that she was completely moored upon the 12th, and as the accident did not happen till above 24 hours after that time, the plaintiff was nonsuited. Angerstein v. Bell, Sitt. at Guildh. after Trin. 1795.

In an insurance upon *freight*, if an accident happens to the ship before any goods are put on board, which prevents her from

from sailing, the insured on the policy cannot recover the freight, which he would have begun to earn, if the goods had been shipped. The circumstances of the case were these:

Tonge v. Watts, 2 Stra. 1251.

The plaintiff insured *on ship and freight* at and from *Jamaica* to *Bristol.* A cargo was ready to put on board; but the ship being careening, in order for the voyage, a sudden tempest arose, and she and many others were lost. The rigging and parts of her were recovered and sold, and the defendant paid into court as much as, upon an average, he was liable to for the loss of the ship: but the plaintiff insisted to be allowed six hundred pounds for the freight the ship *would have earned* in the voyage, if the accident had not happened. But as the goods were not actually on board, so as to make the plaintiff's right to freight commence; Lord Chief Justice *Lee* held, he could not be allowed it, and he was nonsuited.

Montgomery v. Egginton, 3 Term R. 362.

But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount. This was so decided in an action brought by the assured on a policy on freight, valued at fifteen hundred pounds: In fact only five hundred pounds worth of freight was on board, when the ship was driven from her moorings and lost; but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time.

Lord *Kenyon* Chief Justice, before whom the cause was tried, told the jury, that the question for their consideration was, whether this was a mere colourable insurance and a gaming policy? or whether it was a *bonâ fide* transaction? if the latter, the assured was entitled to recover for the whole value in the policy. The jury found the whole sum. The defendant's counsel obtained a rule for a new trial, which he afterwards abandoned, the Court being strongly of opinion against him.

Thompson v. Taylor, 6 Term R. 478.

So also in an *open* policy on freight, *at and from London and Teneriffe to any of the West India Islands,* (*Jamaica* excepted,) the underwriters were held liable to pay the insurance, though

though the ship sailed from *London* in ballast, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ship was under a charter-party *to depart out of the river Thames, and proceed to Teneriffe, and there to load and receive on board from the freighters 500 pipes of wine, to be delivered in the West Indies, for the freight of which 500 pipes the freighters covenanted to pay 35s. per pipe;* the Court held, that the instant the ship departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover. At the trial, the plaintiff had obtained a verdict, and the case was afterwards brought before the Court upon a motion to enter a nonsuit. After argument at the bar,

Lord *Kenyon* said — " When this case came on at *nisi prius*, I thought the plaintiff was not entitled to recover; because I considered it as similar in every respect to that of *Tonge* v. *Watts*, and had it been so, my judgment now would have gone with that case. But this case depends upon its own peculiar circumstances. It is admitted, that if this contract had an inception, that the right to freight then commenced, and the policy attached. Now by the charter-party there was an inception of the contract, by the departure from the *Thames*; for the covenant in the charter-party was to go from the port of *London*. In the case from *Strange*, the inception of the contract would have been by taking the goods on board, which not being done, the insurance did not attach. In the case of *Montgomery* v. *Egginton*, there was an inception of the contract, and the plaintiff recovered. The case in *Strange* importantly differs from this; but I am now completely satisfied, though the case is new, that the plaintiff ought to recover."

Mr. Justice *Grose*. — " In this case the freight begins to run in consequence of the ship's departure from *London*; the plaintiff therefore has an interest in the voyage. But in *Tonge* v. *Watts*, the voyage was not begun, nor were the goods on board."

Mr. Justice *Lawrence*. — " I think this plaintiff had an insurable interest: for it seems to me equally as strong an interest

See post, ch. 14.

interest as the profits to arise from a cargo of molosses, which have been held to be an insurable interest. It is said that the plaintiff had a mere right of action against the freighter; and if he had not provided a cargo, though the plaintiff might recover against the freighter for breach of contract, yet he could not recover against the underwriters. It is true an insurance on freight could not have been recovered, if the ship had proceeded to the *West Indies* without one. But here, by a peril in the policy, the assured is prevented from earning a specific freight; and therefore the rule for entering a nonsuit must be discharged."

Horncastle v. Suart, 7 East, 400.

So where a ship was chartered on a voyage from *London* to *Dominica*, and back to *London*, at a certain freight upon the outward cargo, and after delivering her outward cargo at *Dominica*, the charterers were to provide her a full cargo homeward, at the current freight from *Dominica* to *London*, it was held, that an *insurance*, by the owner of the ship, on the freight *at* and from *Dominica* to *London*, *attached* while the ship lay at *Dominica*, delivering her outward cargo, *and before any part of the homeward cargo was shipped*, during which time she was captured by an enemy, the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced, and it being impossible to distinguish this case from that of *Thompson* v. *Taylor* (supra.)

Cellar v. M'Vicar, 1 New Rep. 23.

In the court of Common Pleas, in an insurance on freight on a voyage at and from *Demarara*, *Berbice*, and the *Windward and Leeward Islands* to *London*; the ship being at *Demarara*, an agreement (not in writing) was entered into by the master with a house there for a freight from *Berbice* to *London*; the cargo to be put on board at *Berbice*, and the ship to take a cargo of bricks and planks from *Demarara* to *Berbice*, and deliver them there; while the vessel was proceeding to *Berbice*, with this cargo on board, she met with an accident, and in consequence never earned her freight. This was held not to be a loss within the policy, for the voyage from *Demarara* to *Berbice* had nothing to do with the voyage insured. The voyage insured was from *Demerara* to *London*, or from *Berbice* to *London*, or from any of the Windward or Leeward Islands, according to the place from which the ship might

might happen to sail on her voyage to *London*. Now, in this case, such voyage never commenced: the case itself excludes any inception of the voyage. The ship took in a cargo for *Berbice*, and then expected to get the cargo she was to carry to *London*.

But subsequently to this, in the same court, in a policy on freight on board the ship *Stranger*, "at and from *London* to *Jamaica*, with liberty to touch at *Madeira*, and to discharge and take in goods there:" it appeared in evidence, that the plaintiff, as owner, had agreed with one *De Franca*, by charter-party, that the ship should take in goods at *London*, and proceed to *Madeira*, and there deliver such part of the goods shipped at *London* as the agents of *De Franca* should direct, and receive on board wine, and proceed to *Jamaica*, and there deliver: and the freighter agreed to pay 135*l*. in full, for freight, during the *whole* voyage from *London* to *Madeira*, and from thence to *Jamaica*; *such freight to be paid in Madeira, on delivery of the goods shipped at London for that place*, by *Madeira* wine at 40*l*. per pipe, to be carried in the said ship free of freight. The ship arrived at *Madeira*, and delivered all her *London* cargo, *except* 33 *casks of coals*, which the captain kept on board to stiffen his ship. Part of the cargo for *Jamaica* was received on board, but not the wine to be paid for freight, when a gale arose, which obliged the captain to cut his cable and run out to sea, where he was captured. The Court unanimously confirmed the verdict of the jury, holding the underwriters liable for a total loss of freight, for the contract of freight was entire, and the charter-party treats the whole as one voyage. The whole freight is to be paid in one gross sum, and that sum is to be paid in *Madeira* wine, valued at a certain sum at *Madeira*. The payment, therefore, is local and indivisible; and on payment of the freight in wine, it is to be carried on in this particular ship to *Jamaica*. Here the accident happened before the condition was performed, on which the freight was payable, namely, the delivery of the goods shipped at *London*.

Atty v. Lindo, 1 New Rep. 236.

In short, the great point in all these cases seems to be, whether there is one entire contract for the voyage out and home, and whether the freight is entire: for the Courts seem

to

to have thought that the doctrine laid down in *Thompson* v. *Taylor*, and the other cases of that description, ought not to be extended. But wherever there has been no contract, the rule in the old case of *Tonge* v. *Watts* (ante p. 56.) must prevail.

Forbes and another v. Cowie, Sittings after Michaelmas 1808, 1 Camph. 520.

Thus in an action on a policy *on freight* of the ship *Chiswick* at and from any port or ports of *Hayti* (*St. Domingo*) to *Liverpool*: the *Chiswick* sailed from *Liverpool*, and arrived at *Hayti*, with a cargo of plaintiff's, which was to be bartered for other goods to be brought back to *Liverpool* in the ship. Part of the outward cargo was bartered for 55 bales of cotton, which were put on board. The remainder of the outward cargo was still on board when the ship was lost by perils of the sea. The remaining part of the outward cargo, though damaged, was saved, and in 12 days after the loss of the ship, was exchanged for other goods the produce of *St. Domingo*, the freight of which would have been of larger value than the sum insured, if the ship had not been lost. The defendant settled for the freight of the 55 bales, without prejudice to a further claim for loss of the freight of the homeward cargo. This case on the part of the plaintiff was compared to that of *Horncastle* v. *Suart* (ante p. 58.) and much pressed. But

Lord *Ellenborough* was more disposed to doubt the authority of that case than to extend it. *There*, however, there was one charter-party for the outward and homeward voyage, and the freight was entire. That is the only ground upon which the decision can be sustained. *Here* I can entertain no doubt. The underwriter does not insure that the ship *shall have* a freight, but only that the owner shall be indemnified for the loss of the freight of goods put on board. What goods were on board when the ship was lost? The outward goods. *They* were not to be brought home on freight: they were to be bartered at *St. Domingo*. They were the means by which the homeward cargo was to be procured. How then have the plaintiffs been damnified upon the subject-matter of this insurance? By losing the freight of 55 bales of cotton, and that they have been already paid by the defendant. The plaintiffs were nonsuited.

In

In the ensuing term, the Court of King's Bench refused a rule to shew cause why this nonsuit should not be set aside. Lord *Ellenborough* on that occasion said, "if there had been "a bag of money on board to purchase a cargo when the loss "happened, would this have been freight; and whether it "was possible to draw a distinction between goods to be bar- "tered for a cargo and money to pay for one?" The other judges concurred, and expressed an opinion, *that the cases upon this subject ought by no means to receive any extension.* Hilary, 1809.

The same case, on the same policy, came before the Court in *Hilary* term 1811, was fully discussed at the bar, and the Court, by Lord *Ellenborough*, delivered a very elaborate judgment, conformably to what is said above. Forbes v. Aspinall, 13 East, 323.

But where a ship was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool*, at the current rate of freight, to be paid at one month from the discharge of her cargo at *Liverpool*, and an insurance made on the homeward freight, the ship being lost at *Jamaica* when she had taken in a part of the homeward freight, and the rest ready to be shipped, the Court held this case was governed by *Thompson* v. *Taylor* and *Horncastle* v. *Suart*, and quite reconcileable with *Forbes* v. *Aspinall*. Davidson v. Willasey, 1 M. & S. 313.

This case has already been mentioned on account of an alteration made in the policy after the time of underwriting; it shall now, however, be considered wholly independant of that circumstance. It was a bill filed in the Court of Chancery, which stated, that the ship *Eyles*, late in the *East India* Company's service, was, in the year 1732, at *Bengal*, at which time the owner employed *I. H.* to insure the ship in the *London* Assurance Office, for five hundred pounds. The adventure thereon was to commence *from her arrival at Fort Saint George*, and thence to continue till the said ship should arrive in *London*, and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice, and that the ship was, and should be rated *at interest or no interest*, without farther account: in consideration whereof *I. H.* paid fifteen pounds premium. *The Eyles came to Fort Saint George in February* 1733, in her way to *England*; Motteux and others, v. the Gov. and Comp. of London Assur. 1 Atk. 545.

land; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, *&c.* she sailed to *Bengal* to be refitted, and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee* sands, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the most proper place to refit, and that she went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board, but water, provision, and ballast.

Lord Chancellor *Hardwicke*.—"As to the question, whether there has been a breach; or, in other terms, a loss, within the meaning of this policy? the general principles laid down by the plaintiff's counsel are right, that stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition, are to be considered. In such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired, but there is not a syllable of proof why she might not have been equally well repaired at *Fort Saint George*. There is one part of this case which distinguishes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ship was lost in *July* 1733, three weeks before the time of making this policy, so that clearly the ship was not at *Fort Saint George* at the time the agreement was made; and therefore it is a material question, whether it comes within the agreement?" His Lordship directed an issue to try, whether the loss in *July* 1733, was a loss during the voyage, and according to the adventure agreed upon; which issue was afterwards found for the plaintiffs, upon a trial in the Common Pleas.

Gordon v. Rimmington, 1 Campbell, N.P. 123.

In a late case, it became a question, whether a voluntary *burning* of a ship, to prevent her from falling into the hands of the enemy, be a loss by *fire*, within the policy? Lord *Ellenborough* said, "The case is new, but I am clearly of opinion that

that the plaintiff is entitled to recover. Fire is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is destroyed by *fire*, it is of no consequence whether this is occasioned by a common accident or by lightning, *or by an act done in duty to the state.* Nor can it make any difference whether the ship is thus destroyed by third persons, officers of the King, or by the captain and crew, acting with loyalty and good faith. Fire is still the *causa causans*, and the loss is covered by the policy." The plaintiff had a verdict. Mr. *Campbell*, the reporter, very properly refers to *Pothier*, *Valin*, and *Emerigon*, to shew that this point has been decided in *France* as Lord *Ellenborough* has decided it, and certainly those authors support His Lordship's doctrine. *Pothier* traité du Contrat d'Assurance, s. 53. *Valin*, Liv. 3. tit. 6. des Assurances, Art. 26. 1 *Emerig.* p. 434.

In an action upon a policy of insurance, before Lord Chief Justice *Hardwicke*, it was held, that the words "at and from *Bengal* to *England*," meant the *first arrival* at *Bengal*; and it was agreed, that when such words are used in policies, *first arrival* is always implied and understood. 1 Atk. 548.

It has likewise been held, that when a ship is insured *at and from a place*, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable: but if all thoughts of the voyage be laid aside, and the ship lie there, five, six, or seven years, with the owner's privity, it shall never be said the insurer is liable; for it would be to subject him to the whim and caprice of the owner. Chitty v. Selwyn, 2 Atk. 359.

This was an action on a policy of insurance on a ship, at and from *Jamaica* to *London*. The ship had also been insured from *London* to *Jamaica* generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to shew when the homeward-bound risk commenced, it was necessary to shew at what time the outward-bound risk determined; and the jury, which Camden v. Cowley, 1 Black. 417.

was special, after an examination of merchants as to the custom, by their verdict decided, that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery.

1 Black. 418.

In the Trinity term following, a motion was made for a new trial, but it was refused; because it had been thoroughly tried, and no new light could be thrown upon it, although Lord *Mansfield* said, the inclination of his opinion at the trial was the contrary way. Mr. Justice *Wilmot* thought the construction put upon the policy by the jury was the right one.

Barrass v. The London Assurance, Sittings after Hilary 1782, at Guildhall.

In a similar case, Lord *Mansfield* laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island to which it was destined: but that the outward policy *upon goods* continued till they were landed.

Leigh v. Mather, Sittings at Guildhall, after Michaelmas Term, 1795.

The doctrine contained in the two last cases has met with material confirmation in a modern decision. It was an action upon a policy of assurance on *the ship Palliser*, and *on goods* on board thereof, on a voyage *at and from Georgia to Jamaica*. The ship arrived in *Montego Bay*, and *moored at anchor*, and there also the agent of the plaintiff sold and *delivered* the greatest part of the cargo to Messrs. *Adams* and *Hatton*, merchants there. The captain then entered into a charter-party with *Adams* and *Hatton*, to proceed from thence to *St. Anne's*, and there to take in a cargo for *London*. After unloading the greatest part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed that the remainder of the cargo (which was lumber) should be carried as ballast to *St. Anne's*, and accordingly the vessel, after taking in some fustick, proceeded towards *St. Anne's*, but was wrecked, and never arrived there. For the plaintiff it was urged, that in such an insurance the ship might go from port to port; and that, at all events, the goods were protected by the policy, *till they were all discharged and safely landed*.

Lord *Kenyon* was clearly of opinion, and was confirmed in that opinion by a special jury, to whom His Lordship parti-

cularly referred upon this occasion, that the risk *on the ship* ceased, *after she had been moored at anchor twenty-four hours* in the *first port* of the island, *for the purpose of unloading:* and the facts disclosed in this case having manifested that *Montego Bay* was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, *the loss of the goods* cannot be recovered under this policy of insurance. A ship insured to *Jamaica generally* cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of ship and goods is the same person. The plaintiff was nonsuited.

In a case in the Common Pleas, it has been held, that under a policy *at and from* an island, a ship is protected in going from port to port in the island. Cruickshank v. Janson, 2 Taunt. 301.

A policy at and from a place, for instance *at and from Lyme to London*, which not only designates a town, but a port also, comprehending a large district of coast, so that *Bridport*, which is eight miles nearer to *London* than the town of *Lyme*, does not protect a cargo laden any where within the limits of the port, such as *Bridport*, but must be taken to refer to the town itself. Constable v. Noble, 2 Taunt. 403.

Similar doctrine had been previously held in a case of *Payne* v. *Hutchinson*, which is to be found in a note in page 405. of 2 *Taunton.*

But the great and leading cases, upon questions of construction, are two, *Tiernay* v. *Etherington*, and *Pelly* v. *the Royal Exchange Assurance Company:* the former determined by Lord Chief Justice *Lee*, and the latter by Lord *Mansfield*. In these cases, the principles which are to be observed in the construction of policies are so fully considered, and the application of them to the particular circumstances of the different cases is made with so much accuracy and perspicuity, that they are to be regarded as the pole star to direct our inquiries upon all similar occasions.

 The

Tiernay v. Etherington, before Lee Chief Justice, 5 March 1743, 1 Burr. 348.

The first of these causes was an action upon a policy of insurance "on goods, in a *Dutch* ship, from *Malaga* to *Gibraltar*, and at and from thence to *England* and *Holland*, "both, or either: on goods, as hereunder agreed, beginning "the adventure from the loading, and to continue till the "ship and goods be arrived at *England* or *Holland*, and "there safely landed." The agreement was, "that upon "the arrival of the ship at *Gibraltar*, the goods might be "unloaded, and re-shipped in one or more *British* ship or "ships for *England* and *Holland*, and to return one *per cent.* "if discharged in *England*." It appeared in evidence, that when the ship came to *Gibraltar*, the goods were unloaded, and put into a *store ship*, (which it was proved was always considered as a warehouse,) and that there was then no *British* ship there. Two days after the goods were put into the store ship, they were lost in a storm. The question was, whether this was a loss within the construction of the policy?

Lee Chief Justice.—"It is certain, that in the construction of policies, the *strictum jus* or *apex juris*, is not to be laid hold of: but they are to be construed largely, for the benefit of trade, and for the insured. Now it seems to be a strict construction, to confine this insurance only to the unloading and re-shipping, and the accidents attending that act. The construction should be according to the course of trade in this place; and this appears to be the usual mode of unloading and re-shipping in that place, *viz.* that when there is no *British* ship there, then the goods are kept in store ships. Where there is an insurance on goods on board such a ship, that insurance extends to the carrying the goods to shore in a boat. So, if an insurance be of goods to such a city, and the goods are brought in safety to such a port, though distant from the city, that is a compliance with the policy; if that be the usual place to which the ships come. Therefore, as here is a liberty given of unloading and re-shipping, it must be taken to be an insuring under such methods as are proper for unloading and re-shipping. There is no neglect on the part of the insured, for the goods were brought into port the nineteenth, and were lost the twenty-second of *November*. This manner of unloading and re-shipping is to be considered as the necessary means of attaining that which was intended

by the policy; and seems to be the same, as if it had happened in the act of unshipping from one ship into another. And as this is the known course of the trade, it seems extraordinary, if it was not intended. This is not to be considered as a suspension of the policy; for as the policy would extend to a loss happening in the unloading and re-shipping from one ship to another, so any means to attain that end come within the meaning of the policy." The plaintiff had a verdict. (*a*)

Afterwards a new trial was moved for; but it was refused by *Lee* Chief Justice, Mr. Justice *Chapple*, and Mr. Justice *Denison*, against the opinion of Mr. Justice *Wright*. Easter Term, 1743.

The next of these causes came before the Court upon a case reserved for their opinion, after a trial and verdict for the plaintiff, at *Guildhall*, before Lord *Mansfield*. It was an action of covenant upon a policy of insurance. Pelly v. The Governor and Comp. of the Royal Exchange Assurance, 1 Burr. 341.

The case states, that the plaintiff, being part owner of the ship *Onslow*, an *East India* ship, then lying in the *Thames*, and bound on a voyage to *China*, and back again to *London*, insured it "at and from *London*, to any ports or places be-"yond *the Cape of Good Hope*, and back to *London*, free "from average under ten *per cent.* upon the body, tackle, "apparel, ordnance, munition, artillery, boat, and other "furniture of and in the said ship: beginning the adventure "upon the said ship from and immediately following the date "of the policy, and so to continue and endure until the ship "shall be arrived as above, and there anchored twenty-four "hours in good safety." The perils mentioned in the policy were the common perils, *viz.* "of the seas, men of war, fire, *&c.*" The ship arrived in the river *Canton*, in *China*, where

(*a*) Where there is a liberty given by a policy to touch and stay at all ports for *all purposes whatsoever*, the stay must be for some purpose connected with the furtherance of the adventure, and whether that purpose be within the scope of the policy is a question for the Court. *Langhorn* v. *Allnutt*, 4 *Taunt.* 511. But whether the ship has staid an *unreasonable* time is for the jury. Same case. Such a liberty includes a liberty for the purpose of taking in part of the goods insured. *Violet* v. *Allnutt*, 3 *Taunt.* 419.

she was to stay to clean and refit, and for other purposes: Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture, were, by the captain's order, taken out of her, and put into a warehouse, or storehouse, called a bank-saul, built for that purpose on a sand bank, or small island, lying in the said river, near one of the banks called *Bank-saul Island*, in order to be there repaired, kept dry, and preserved, till the ship should be heeled, cleaned, and refitted. Some time after this, a fire broke out in the bank-saul, belonging to a *Swedish* ship, and communicated itself to another bank-saul, and from thence to that belonging to the *Onslow*, and consumed the same, together with all the sails, yards, *&c.* belonging to the *Onslow* that were therein. The case states further, that it was the *universal and well known usage*, and has been so for a great number of years, for all *European* ships which go a *China* voyage, except *Dutch* ships, (who for some years past have been denied this privilege by the *Chinese*, and who look upon such denial as a great loss,) when they arrive near this *Bank-saul Island*, in the river *Canton*, to unrig the ships, and to take out their sails, yards, tackle, cables, rigging, apparel, and other furniture; and to put them on shore in a bank-saul, built for that purpose on the said island (in the manner that had been done by the captain of the *Onslow* on the present occasion) in order to be repaired, kept dry, and preserved, until the ships should be heeled, cleaned, and refitted. The case adds, that so doing is prudent, and for the common and general benefit of the owners of the ship, the insurers, and insured, and all persons concerned in the safety of the ship. The ship arrived from her said voyage in the *Thames*, having been again rigged, and put in the best condition the nature of the place and circumstances of affairs would permit. The question for the opinion of the Court was, whether the insurers are liable to answer for this loss, so happening upon the bank-saul, within the intent and meaning of this policy?

The Court, after a solemn argument, took time to consider the question, and then Lord *Mansfield* delivered the unanimous opinion of the Court for the plaintiff.

Lord

Lord *Mansfield*. — "By the express words of the policy, the defendants have insured the tackle, apparel, and other furniture of the *Onslow*, from *fire*, during the whole time of her voyage, until her return in safety to *London*, without any restriction. Her tackle, apparel, and furniture, were inevitably burnt in *China*, during the voyage, before her return to *London*. The event then, which has happened, is a loss within the general words of the policy; and it is incumbent upon the defendant to shew, from the manner in which this misfortune happened, or from other circumstances, that it ought to be construed a peril, which they did not undertake to bear. If the chance be varied, or the voyage altered, by the fault of the owner or master of the ship, the insurer ceases to be liable; because he is only understood to engage that the thing shall be done safe from fortuitous dangers, provided due means are used by the trader to attain that end. But the master is not in fault, if what he did was done in the usual course, and for just reasons. The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Every thing done in the usual course must have been foreseen, and in contemplation at the time he engaged; he took the risk, upon a supposition, that what was usual or necessary should be done. In general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed. The usage, being foreseen, is rather allowed to be done, than what is left to the master's discretion, upon unforeseen events: yet if the master, *ex justâ causâ*, go out of the way, the insurance continues. Upon these principles it is difficult to frame a question, which can arise out of this case, as stated. The only objection is, that they were burnt in a bank-saul, and not in the ship; upon land, not at sea, or upon water: and being appertinent to the ship, losses and dangers ashore could not be included. The answer is obvious: First, the words make no such distinction: Secondly, the intent makes no such distinction. Many accidents might happen at land, even to the ship. Suppose a hurricane to drive it a mile on shore; or an earthquake may have a like effect; suppose the ship to be burnt in a dry

dry dock, or suppose accidents to happen to the tackle upon land, taken from the ship, while accidentally and occasionally refitting, as on account of a hole in its bottom, or other mischance: these are all possible cases. But what might arise from an accidental repair of the ship is not near so strong as a certain, necessary consequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ship must be heeled, cleaned, and refitted, in the river of *Canton*: they knew that the tackle would then be put in the bank-saul: they knew it was for the safety of the ship, and prudent that they should be put there. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship, *ex justâ causâ*: but describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned. Was the chance varied by the fault of the master? It is impossible to impute any fault to him. Is this like a deviation? No: 'tis *ex justâ causâ*, which always excuses. Had the insurers in this case been asked, whether the tackle should be put in the bank-saul? they must, for their own sakes, have insisted that it should. They would have had reason to complain, if, from their not being put there, a misfortune had happened. In such a case, the master would have been to blame, and by his fault would have varied the chance. They have taken a price for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one. Therefore, we are all of opinion, that in every light, and in every view of this case, in reason and justice, and within the words, intent, and meaning, of this policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss."

Brough v. Whitmore, 4 Term R. 206. See post. for another point.

This case has since been confirmed by Lord *Kenyon*, and the whole Court of King's Bench.

Noble and others v. Kennoway, Dougl. 492.

So also in another case, the same principles were adhered to, and the same rule of decision was adopted. The insurance was upon the ships the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port, or ports,

ports, of discharge, on the coast of *Labrador*, with leave to touch at *Newfoundland*, and upon any kinds of goods and merchandizes; and also on the ships, till they should be arrived at their port of discharge, and should have moored at anchor *twenty-four hours, and on the goods until the same shall be there discharged, and safely landed.* By a clause in the policy, money advanced to the fishermen was insured. The *Anne* arrived safe on the coast of *Labrador* on the 22d of *June*, and the *Hope* on the 14th of *July* 1778. From the time of their arrival, the crews were employed in fishing, and had taken out none of their cargoes, except at leisure hours (partly on *Sundays*) such things as were immediately wanted. On the 13th of *August*, an *American* privateer entered the harbour, and took both the vessels, there being at that time nobody on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unnecessary delay in unloading the cargoes, in consequence of which they had been exposed to capture, and that the underwriters ought not to be liable for what had happened from the negligence of the insured. The plaintiffs rested their case on the words of the policy, and the usage of the trade. They called the captain of the *Anne*, who swore, that he had been the same voyage three times in the three last years, and that they had proceeded in the same manner during each of the voyages; that he did not think the plaintiffs had warehouses sufficient to have held the goods if they had been landed; and that there were no settlements on the coast of *Labrador*, but those belonging to the plaintiffs. One of the sailors swore to the same effect. The plaintiffs then called one *French*, to prove the custom of the *Newfoundland* trade. This evidence was objected to; but Lord *Mansfield* admitted it, and the witness swore, that in the *Newfoundland* trade, it is customary to keep their goods on board several months, and that sometimes they have part of their homeward cargo of fish, and part of their old cargo on board, at the same time. That the first object is to catch fish, and they unload only at times when they cannot fish. The old cargo being chiefly salt and provisions, it is taken out gradually for curing the fish, and for consumption. The testimony of this witness was con-

firmed by one *Newman*. Neither *Newman* nor *French* had been at *Labrador*. Mr. *Hunter* was then called, who proved, that some years since, he used to send vessels of his own, and also chartered vessels to *Labrador*, and that it was usual, in chartering vessels, to stipulate that they should have sixty days allowed for discharging. That he apprehended they were oftentimes longer in fact, and that it was not so easy to discharge a cargo at *Labrador* as at *Newfoundland*. Upon this evidence a verdict was found for the plaintiffs, and in the subsequent term the defendant moved to set it aside, which was not granted.

Lord *Mansfield*. — "The trade of fishing on the coast of *Newfoundland*, especially from the west of *England*, has been known and practised for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The insurance here is on the ships, and *on the goods till landed*. The defendant says, the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. *Every underwriter is presumed to be acquainted with the practice of the trade he insures, and,* that, *whether it is recently established or not*. If he does not know it, he ought to inform himself. It is no matter if the usage has been only for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known, that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at *Newfoundland*. I still think the evidence on that subject was properly admitted, to shew the nature of the trade. The point is not analogous to a common law custom."

Mr. Justice *Buller*. — "I think there was sufficient evidence, without calling in aid the usage of the *Newfoundland* trade; for it appeared on the face of the policy, that the fishery was the purpose of the voyage: but I think the evidence objected to was properly admitted. If it can be shewn, that the time would have been reasonable in one place, that is a degree of evidence to prove that it was so in another. The effect of such evidence may be taken off by proof of different circum-

 stances.

stances. It is very true, that the custom of one manor is no evidence of the custom of another; that has been determined in many cases: but the point here is very different; it is a question concerning the nature of a particular branch of trade."

So in a case before Lord *Eldon*, when Chief Justice of the Common Pleas, His Lordship allowed the usage of trade to protect an *intermediate* voyage to *Sidney* from *Newfoundland* in ballast, and back with a cargo of coals, upon an insurance *on fish* on the ship *Duchess of Gordon at and from Newfoundland to a port in Portugal.* The ship had arrived at *Newfoundland* in *July*, she then proceeded to *Sidney* for coals, arrived there in *August*, and delivered her coals at *Newfoundland* in *October*; she then loaded her fish, and sailed for *Oporto* in *November*, and was lost. The underwriters insisted that the trip to *Sidney* should have been communicated to the underwriters, as it tended, by retarding the commencement of the voyage insured, to increase the risk. The plaintiff relied on the usage of trade, which was proved by several witnesses.

Ougier v. Jennings, Sittings in C. P. 1800. 1 Campb. 505. note (a).

Lord *Eldon*. — "I think the practice in this case is as capable of being received, as in other cases, in which it has been admitted. This is like the case of the ship that was employed on the *Labrador* coast, where she fished after her arrival, and before her outward cargo was discharged. There is no doubt that the policy *primâ facie* means the first cargo, which shall be laden after the ship's arrival: but the underwriter must refer himself to the usage of the trade, which he is bound to know. The first question is, whether there be such an usage? If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you (the jury) to give it effect. If several ships belonging to a merchant arrive together at *Newfoundland*, and finding cargoes for some only, he *bonâ fide* sends the rest on an intermediate voyage, it seems reasonable; though studiously sending a ship on an intermediate voyage out of her turn would be a deviation. If you think the usage does exist; if you think it reasonable; and if you think this ship acted

See ante, p. 70.

acted *bonâ fide* in taking the intermediate voyage, you will find for the plaintiff." The jury did so, and the verdict was not impeached.

Vallance v. Dewar, 1 Campb. 503. Lord *Ellenborough* had also an opportunity of declaring his opinion on this point; where His Lordship held, that in a common insurance on ship, freight, and cargo, at and from any port or ports in *Newfoundland*, to one port of discharge in *Portugal*, or to any port or ports in the United Kingdom, it is not necessary to communicate to the underwriters, that before that risk commences, the vessel will be employed either in fishing, (called *banking*,) or in an intermediate voyage, for the usage of that particular trade covers it, and the underwriters are bound to know the nature and circumstances of the trade, to which their policy relates. His Lordship added, The assured is not bound to make a laborious disclosure of what is known to all. It is notorious then that in this trade, upon their arrival, ships are either employed in banking, or take an intermediate voyage. If so, it must be presumed to be equally in the knowledge of both parties. According to the general import of the words "at and from," the policy would attach upon the ship's first mooring on the coast; but it may doubtless be explained differently by usage: and as between these parties the policy must be taken to be the same, as if it had been expressed to attach upon the expiration of the banking or intermediate voyage. The underwriters were not liable for any antecedent loss, and cannot complain of what was previously done as a deviation. Although there should be exceptions to the usage, that would be immaterial. Things are presumed to go on in their ordinary course; and if an usage be general, though not uniform, the underwriters are bound to take notice of it.

Kingston v. Knobbs, M. T. 49 G. 3. 1 Campb. 508. in notes. So Lord *Ellenborough* held, on an insurance *from Oporto to London*, where the ship having taken in part of her cargo *within*, went to take the remainder without the bar; and where several witnesses proved, that it had been usual to do so, that the underwriters *were bound of themselves to take notice of the usage;* although it appeared that sometimes in policies, express liberty was given to load on either side the bar.

Since

Since Lord *Ellenborough* was Chief Justice of the King's Bench, a case arose in which His Lordship and the other judges very fully considered the rules which are to govern the construction of policies of insurance, and the effect of written words upon the usual printed form of this species of contract.

It was an action on a policy of insurance, "lost or not "lost, at and from (*a*) *all, any, or every port and place where "and whatsoever on the coast of Brazil, and after the 17th "day of September to the Cape of Good Hope*, upon any kind "of goods and merchandizes, and also upon the body, &c. "of the ship *Chesterfield*, &c. beginning the adventure upon "the said goods and merchandizes from the loading thereof, "aboard the said ship *at all, any, or every port and place where "or whatsoever on the coast of Brazil, and from the 17th September* 1800, and upon the said ship, &c. *in the same manner*; and so shall continue and endure during her abode "there, upon the said ship, &c.; and further until the said "ship, &c. and goods, &c. shall be arrived at *Simon's Bay "or Table Bay, both or either, with liberty to call at St. Helena, or elsewhere*, upon the said ship, &c. and upon the "goods, &c. until the same be there discharged, *at the rate "of four guineas per cent. to return three pounds ten shillings, "should the ship have arrived or this risk otherwise have "ceased, on or before the 17th of September*." By a memorandum the ship, goods, and freight were all valued. This is the whole of the policy that seems to me to be material; the facts touching this part of the case were, that the goods were taken in at the *Cape of Good Hope*, and the ship went from thence in *February* 1800, to *Benguela*, on the coast of *Africa*, and afterwards to *St. Catharine's*, on the coast of *Brazil*, on the 30th of *May*, then to *Rio Janeiro* on the 27th *July*, staid there upwards of two months, and remained on the coast till the latter end of *November*, when on suspicion of illicit trading with the *Spanish* enemy, she was taken possession of by some of His Majesty's ships of war, and carried again to the *Cape, with the original cargo on board*, (but none was ever taken in at *Brazil*,) where she was libelled by the captors in the Vice-admiralty court there, on which the assured aband- Robertson v. French, 4 East, 130.

(*a*) The written parts of the policy are printed in italicks.

oned

oned to the underwriters; and the ship, after being liberated by the sentence of the Court, was sold there, and has since arrived in *England.* The question, on this part of the case was, whether *as no goods were ever loaded at Brazil,* neither ship or goods were covered by the policy in question. The only case referred to in the argument at the bar was *Hodgson* v. *Richardson*, 1 *Black. Rep.* 463. (post. Chap. "Of Fraud in Policies.") The Court decided against the claim of the plaintiffs, thus holding that the policy never attached, as no goods were loaded at *Brazil.* In delivering the judgment of the Court, upon a rule to enter a nonsuit, amongst other topicks, the following general rules in the construction of policies, were laid down by Lord *Ellenborough.* Secondly, It has been argued that the policy on this ship and cargo never attached, the adventure of the cargo being by the terms of the policy made to commence from the loading the goods aboard the ship on the coast of *Brazil;* an event which, as it was contended by the defendant, never happened, inasmuch as *the goods were not loaded there, but at the Cape of Good Hope.* It was also contended, on the part of the defendant, that the adventure on the ship being by the terms made to begin *in the same manner* with that on the goods, could of course have no commencement, if that on goods never attached. In the course of the argument, it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments, and in all other cases: it is therefore proper to state on this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, namely, *that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it,* which terms are themselves to be understood in their plain, ordinary, and popular sense, *unless they have generally in respect to the subject-matter, as by the known usage of trade,* or the like, *acquired a peculiar sense distinct from the popular sense of the same words;* or *unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.* The only difference between policies of assurance and other instruments in this respect, is, that

that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing, (subject indeed always to be governed in point of construction by the terms and language with which they are accompanied,) are entitled nevertheless, *if there should be any reasonable doubt upon the sense and meaning of the whole*, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula, adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects. His Lordship then, after a very nice, critical, and grammatical discussion of the words used, said, "Is there any thing to be found in the policy which assigns to these words a sense apparently different from the ordinary grammatical sense of them? And looking as we are obliged to do to the policy, and to the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourselves at liberty to disjoin in point of effect and construction the words "*at all, or any port or place on the coast of Brazil*," from the words, "*from the loading thereof aboard the said ship*," by which they are immediately preceded, and with which by immediate context they appear to us to be necessarily united. If the same words had not been thus incorporated with the body of the text of the printed words, and made to form therewith one entire and continued chain of words, and one unbroken sentence of intelligible expressions, all applicable to the same subject-matter, it might have been open to us to have given them a different meaning, and to have considered them as words written in the margin of the policy, (and applying therefore indefinitely to the whole of the policy, and not to any particular part of it,) are usually considered; that is, as controuling the sense of such parts of the printed policy to which, in sound construction, and by reasonable reference, they may appear to apply. As for instance, where the word *ship* is written in the margin of the policy, or *freight* or *goods*; in such cases, the general terms of the policy, applicable to other subjects, besides the particular one mentioned

in

in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from "ship and goods," the only subjects of insurance in the printed policy; namely, where the object of insurance, as declared by the marginal memorandum, is, money lent on *bottomree*, or at *respondentia*, or the like: the meaning of which marginal memorandum may be translated thus: we mean to insure the subject so named, "freight," for instance, arising or accruing during the limits of the voyage within described, from the carriage of goods on board the ship named against the perils within enumerated, and upon the premium herein specified. In other words, we adopt the general language of the policy, as far as it may serve to effectuate this object, and no further." The rule for entering a nonsuit, in the particular case, was made absolute. But I have given thus much of Lord *Ellenborough's* argument, not so much for the decision of the particular case, as for the importance of the rules of construction, which His Lordship has, in *many* instances, confirmed, and in all so clearly elucidated.

The subject principally considered in the last case, namely, *whether a policy, from* A. *to* B., *beginning the adventure upon the said goods from the loading thereof aboard the said ship*, shall cover a policy on goods loaded *antecedently* to the vessel being at *A.*, has undergone a great deal of discussion in our courts, from the time of Lord *Mansfield* to the present. The first case of *Hodgson* v. *Richardson*, 1 *Blackst. Rep.* 463. (see post. on Fraud,) was chiefly decided on the ground of the assured not having communicated to the underwriters what he well knew, that the vessel which he insured "at and from *Genoa*," had lain there five months, with her loading on board of potash and verdigrease, cotton, and other perishable commodities, which she had received on board at *Leghorn*.

In *Robertson* v. *French*, which has just been stated, the loading was confined to a particular place, beginning the adventure upon the said goods from the loading thereof aboard the said ship at all, any, or every port or place where or whatsoever *on the coast of Brazil*; whereas the goods were *not* loaded there, but at the *Cape of Good Hope*.

In

In *Horneyer* v. *Lushington* a particular place was also mentioned for the commencement of the risk *on goods*, namely, from the loading thereof aboard the ship *at Gottenburgh*, whereas the goods had been previously loaded at *London*. Horneyer v. Lushington, 15 East, 46.

But the Courts both of the King's Bench and Common Pleas at length decided, that where the words of the policy were general *at and from a place*, and the adventure on the goods to begin *from the loading thereof on board the ship*, (without saying where,) as in *Spitta* v. *Woodman* and *Langhorn* v. *Hardy*, both in the Court of Common Pleas, and *Mellish* v. *Allnutt*, goods loaded on board before the ship's arrival at the place named as that from which the risk is to commence will not be protected. 2 Taunt. 416. 4 Taunt. 628. 2 M. & S. 106.

But wherever the Court can collect from the circumstances of the case, or from the words used, that it was the intention of the parties to cover such antecedent loading, they will give the policy that construction.

Thus in an insurance on sugar, *free of particular average, at and from Landscrona to Wolgast*, the underwriters had been informed that the cargoes *had been shipped* at *Gottenburgh* on board the same vessel some months before. Part of the cargo was taken out of the ship's hold and landed on the quay, and replaced in the ship. A sufficient quantity was taken out to enable the custom house officers at *Landscrona* to inspect and examine the whole cargo on board, the duties on which were paid. The Court held this to be an *actual* loading and reloading of part, and a *virtual* reloading of the whole, as far as unloading and reloading were necessary for the purpose of ascertaining and paying the duties at that port, which according to the policy is to be regarded as the loading port. Nonnen v. Kettlewell, 16 East, 17[illegible].

So where a policy on goods at and from *Gottenburgh, to take in and discharge goods wherever the ship may touch at*, declared it to be *in continuation* of former policies. The defendant, however, was *not* an underwriter on such former policies, and the goods insured were in fact loaded *at Virginia*; [illegible] 10 [illegible] 240.

ginia; the Court thought this memorandum indicative that the prior loading was in the contemplation of the parties.

Gladstone v. Clay, 1 Maule & Sel. 418. And finally, where the word *wheresoever* was added thus, beginning the adventure upon the said goods from the loading thereof on board *wheresoever*, the Court thought this word sufficient to cover the loading *wheresoever* it should take place, and to draw the case out of the construction put on former cases, though not enlarging the extent of the damage for which the underwriter is liable, which still must be confined to damage arising within the limits marked out by the policy, namely, from *Pernambuco* to *Liverpool*.

Although the decisions in all the above causes, notwithstanding the vast variety of circumstances that are to be found in them, are so uniform in principle; and although we find, that the learned judges make a constant reference to the usage of trade; yet in no instance whatever has this been so apparent as in the cases of insurance upon *East India* voyages, in which the insurers have been held liable, not only for events which may possibly happen from the port of discharge to that of delivery; but also for all intermediate or country voyages, upon which the ship may be dispatched by the order of the council of any of the *East India* Company's settlements abroad.

Grant v. Paxton, 1 Taunt. 468. Grant v. Delacour, 1 Taunt. 463.

It is not that, in these cases, the judges have given a greater latitude to the usage of trade, than in any other; but because, from the great variety of cases that have arisen upon the subject, the usage with regard to the *East India* voyage is more notorious, and better established than in those where the question has but seldom occurred. The grounds and reasons of such decisions seem to have been the terms in which all the printed charter-parties of the *East India* Company are conceived. By those charter-parties, liberty is given to prolong the ship's stay for a year; besides which, it is very common, by a new agreement, to detain her a year longer: and the longer a ship is kept, it is the more beneficial to the owners. The words of the policy, too, are adapted to this usage, being without limitation of time or place, and without any reference to the first voyage particularly mentioned in the

charter-

charter-party. These charter-parties, being printed, are matter of public notoriety; and are so generally and universally known, or may be so, by an inquiry at the *India House*, that the chance of her stay is always one of the risks insured: and both the insured and insurer must be supposed to be fully apprized and sufficiently conusant of it. Indeed, the understanding of the policy depends so much on the course and usage of the *East India* trade, that it seems to be contradictory to the policy to say, that the underwriter did not underwrite for a country voyage.

All these principles were fully laid down by Lord *Mansfield* in a very few years after he took upon him the administration of justice in this country; and they have been frequently recognized, and invariably pursued in a multitude of decisions upon such policies since that time. The learned chief justice, when he laid down these rules as the ground of his then opinion, and as the guide of future decisions, said he did so, because the Court esteemed this to be the most convenient way of determining the question; for whoever should thereafter insure on an *East India* ship would know, that he insured the contingencies, and might take proper precautions against them if he pleased. Whereas if every person should be obliged to open to the insurer all the grounds of his expectations about the ship's continuance in the *East Indies*, or coming to *England*, it might produce great litigation and confusion in cases arising upon these policies.

The cases, in which these principles as to *East India* voyages were first settled, were the nine causes tried upon the ship *Winchelsea* an *East Indiaman*; in all of which the policies were the same, the parties only being different; and all of which were at first tried with various success; but the nine verdicts were ultimately uniform for the plaintiffs, the insured, against the underwriters. Salvador v. Hopkins, 3 Burr. 1707.

The charter-party was in the usual printed form, and contained a clause, empowering the Company's servants abroad to detain the ship a year longer, if they pleased, than the time originally limited by the charter-party. The insurance was in these words, " at and from *Bengal*, to any ports or " places

"places whatsoever in the *East Indies*, *China*, *Persia*, or "elsewhere, beyond the *Cape of Good Hope*, forwards and "backwards, and during her stay at each place until her "arrival at *London*, on money, *&c.*" On the 25th of *March* 1762, the ship sailed; on the 19th of *September*, in the same year, she arrived at *Bombay*: and early in the *November* following, she left *Bombay* the first time. The ship arrived at *Calcutta*, in *Bengal*, on the fifth of *March* 1763; and on the twenty-eighth of the same month, the president and council of *Bengal* entered into a new agreement with the captain, reciting, that the charter-party would expire on the 11th of *February* 1764, but that the president and council, finding it expedient to detain the ship in *India*, and being desirous of having the time limited in the charter-party prolonged, *&c.* the indenture therefore witnesseth, that the captain lets the ship to freight for one whole year from the said 11th of *February* 1764. The ship arrived at *Bombay* a second time in *July* 1763: in *December* following, she again sailed for *Bengal*, and arrived there early in 1764; on the 19th of *March* in that year she left *Bengal*, in order to proceed for *Bombay*, and on the twenty-first of that month, subsequent to the expiration of the old charter-party, the ship was lost. On the third of *April* 1764, Mr. *Hume*, the plaintiff in several of these actions, received a letter from the captain, dated the 14th of *April* 1763, inclosing a copy of the new agreement; which letter was publicly read in a coffee-house. The next day after the receipt of the letter, some insurances were made by Mr. *Hume*. On the 17th of *July* 1764, other insurances were effected by Mr. *Hume*, and all the other insurances
3 Burr. were made, after the captain's letter of the 14th of *April* 1763
1712. had been received and publicly read in a coffee-house.

The Court, after laying down all those principles above stated, respecting the notorious usage of this branch of trade, enlarged upon the circumstances peculiarly distinguishing these causes. "No mention was made, or question asked, "at the time of underwriting, when the ship was chartered; "when she sailed from *England*: when she arrived in *India*; "whether she was detained a year according to the proviso in "the charter-party: and yet her continuance in the *East* "*Indies* depended upon all these facts. If they ought ne-

"cessarily

"cessarily to be disclosed, the policy was void, to the knowledge of the underwriters, at the time they took the premium. The evidence in all the causes was very strong, that her staying a year longer, if known, would not have varied the premium. This ship was insured at the same premium after the prolongation of her stay in *India* was known. None of the defendants desired to be off, after they knew that an account of the new agreement had been received in *England* upon the 3d of *April* 1764, which was notorious to them all, before the intelligence of her loss, which came in the *October* following. So that if there had been any force in the objection, it would have been waved by the acquiescence of the underwriters, after they were fully apprized of the whole."

So also, in an action upon a policy "on the goods, specie, and effects of the plaintiff, on board the ship on her voyage from *London* to *Madras* and *China*, with liberty to touch, stay, and trade, at any ports or places whatsoever," a similar question arose upon the following facts. When the ship arrived at *Madras*, she was too late to go to *China* that year; upon which she was employed by the council there to go from *Madras* to *Bengal* to fetch rice, which voyage she performed once, and, in attempting to perform it a second time, was lost. The jury found a verdict for the plaintiff.

Gregory v. Christie, B. R. Trin. 24 G. 3.

A new trial was afterwards moved for on two grounds, one of which only is material here, that these intermediate voyages were not insured under the policy: for that the words "to touch, stay, and trade at any ports or places whatsoever," only meant, to give a licence to stay at such places as it should be necessary to stop at *in the course of the voyage*.

Vide supra, c. 1. p. 14. where the other point is stated.

Lord *Mansfield*.—"To understand this policy you must refer to the course of trade to which it relates. What is the course of trade with the *East India* Company? If an *India* ship come to *Madras* too late in the season to proceed to *China*, the council employs her in an intermediate voyage. It is beneficial to all parties so to employ her; the underwriters are perfectly well acquainted with this usage, and are bound to take notice of it. Before the year 1780, it was

 usual

usual to insure both the outward and homeward bound voyage in one policy, and then the words "*backwards and* "*forwards*" were inserted: but since that time they have separated the insurance, and insure the outward voyage in a distinct policy. The policy in question differs from others; because it contains a permission to trade, as well as to *touch and stay* at any ports or places, which is not usual in policies of this nature: for in general they only permit them to *touch and stay*, which words can only be intended to give a permission so to do, if necessity oblige them; but to *touch, stay, and trade* are words so large, that they seem to include the intermediate voyage. It would narrow the construction very much indeed, to say that the policy relates to those places *only*, at which they shall stop *in* the voyage. The words made use of certainly take in the intermediate voyage; and the usage of trade confirms this construction." The consequence of this opinion was, that the verdict of the jury was held to be right.

Farquharson v. Hunter, B. R. Hilary 25 G. 3.

So also, in an action on a policy of insurance upon the ship *Blandford*, "at and from *London* to *Madras* and *Bengal*, "beginning the risk upon the said ship, &c. at *London*, and "so to continue till the arrival of the said ship at *Madras* "and *Bengal*, with liberty to touch and stay at any port or "place in this voyage:" the facts were these. The *Blandford* arrived at *Madras*, where her cargo was unloaded, by order of the presidency; she was then sent for rice to *Visagipatnam*, and by an entry in the council book, her voyage to *Bengal* is said to be postponed. That part of her outward-bound cargo, which was intended for *Bengal*, was sent thither in the *Lord Mulgrave*, and afterwards the *Blandford* was sent to *Bengal* in ballast, and was taken in the passage; for which loss this action was brought. At the trial, Lord *Mansfield* thought the words in the policy would not admit of such a latitude of construction, as to take in the intermediate voyage, the words being much narrower than those in *Gregory* v. *Christie*: upon which the plaintiff was nonsuited.

However, in the following term, when a motion was made to set aside the nonsuit, His Lordship said, "This is a policy "on the ship: it is an *India* voyage; and the usage as to the "intermediate

"intermediate voyages is notorious to both parties; and the "contract refers to it. The insurance here is from *London* "to *Madras* and *Bengal*. What is the usage of the trade? "That when the ships arrive at *Madras*, the council may "send them elsewhere." — The other judges concurred; and the rule for setting aside the nonsuit was made absolute.

From these cases it is evident, that in the construction of *East India* policies, whether the words be large and comprehensive, as in *Salvador* v. *Hopkins*, and *Gregory* v. *Christie*; or restrained and limited as in the last case, the usage of trade shall always be considered, and the intermediate or country voyages held to be insured. At the same time, though the general rule be so, the parties contracting may, by their own agreement, prevent such a latitude of construction; and so Lord *Mansfield* said in *Salvador* v. *Hopkins*. In order to do this, it is not necessary that express words of exclusion should be inserted in the policy; but if, from the terms used, the Court can collect that such was the intention of the parties, that construction which is most agreeable to their intention shall most assuredly prevail.

Thus, in an action upon a policy, the voyage insured was described in these words: "at and from *Port L'Orient* to "*Pondicherry*, *Madras*, and *China*, and at and from thence "back to the ship's port or ports of discharge in *France*, with "liberty to touch, *in the outward or homeward-bound voyage*, "at the isles of *France* and *Bourbon*, and at all or any other "place or places what or wheresoever." In a subsequent part "of the policy there was this clause, "and it shall be lawful "for the said ship *in this voyage*, to proceed and sail to, and "touch and stay at any ports or places whatsoever, as well "on this side as on the other side of the *Cape of Good Hope*, "without being deemed a deviation." The ship arrived at *Pondicherry*, and after remaining there one month, she sailed for *Bengal*, instead of going to *China*; having wintered at *Bengal*, and received considerable repairs, she returned to *Pondicherry*; and having taken in a homeward-bound cargo, proceeded in her voyage back to *L'Orient*, but was taken by the *Mentor* privateer. The question in that case, as far as it is material to us in this part of our work, was, Whether the

Lavabre v. Wilson, and Lavabre v. Walter, Dougl. 284.

Mr. Douglas. voyage to *Bengal* was insured within the construction of this policy? The reporter of this case says, it was insisted, in the opening for the plaintiffs, that, under the general liberty given by the policy, of touching at all places whatsoever, the vessel might go to *Bengal*, which, by the operation of those words, was as much part of the voyage as if it had been expressly named. — Lord *Mansfield*, however, having intimated a clear opinion, that the general words were, by the expressions of "*in the outward or homeward-bound voyage*," and "*in this* "*voyage*," qualified and restrained so as to mean all places whatsoever in the usual course of the voyage "*to and from* "*the places mentioned in the policy*," this ground was immediately abandoned, and never farther mentioned by the counsel for the plaintiffs in the progress of these causes.

Richardson v. London Assurance Company, 4 Campb. 94. In a very late case upon an *East India* captain's investment, to all or any of the ports or places, &c. *until arrived at the last place of discharge* on the *outward* cargo, Lord *Ellenborough* held, that the outward voyage terminated, where *all* the *Company's* outward cargo was discharged.

In the war which terminated in 1815, so many ports in the *Baltic* were at one time hostile, or at least under the influence of *French* politicks, that it was extremely difficult for a *British* trader to know certainly beforehand what ports would be open for his reception, when he arrived. Therefore it was very common to insure to *port or ports*, or to the ship's *port of discharge*, in the *Baltic*, leaving it open to the discretion of those, who had the conduct of the voyage, to govern the adventure in such manner as would be most advantageous upon their arrival in that sea. But on the other hand, the underwriters knew from experience that governments retaining their ancient forms, and apparently neutral, were still so much under the overpowering influence of *French* domination, that vessels and cargoes were often confiscated, by those who governed, not having themselves the power to resist the command to do so. They therefore in their turn frequently inserted in the policies a warranty on the part of the assured, exempting them (the underwriters) from capture, seizure, or confiscation in the ship's port of discharge. These warranties were variously worded, though *in effect* in the same way. Some

were

were *free of capture or seizure in the ship's port of discharge*: some were *free from confiscation by the government in the ship's port or ports of discharge*; and others *free from capture in the ship's port of destination*. (a) 13 East, 394. 3 Taunt. 499. 4 Taunt. 387—660.

The first question in all these cases was a mere question of fact for the jury; was the place where the capture was made the port where the ship meant *to discharge?* This could only be judged of from a variety of circumstances and from the conduct of the parties, manifesting an intention, but for the capture, *there* to put an end to the adventure. This was the case in *Levin* v. *Newnham*, 4 *Taunt*. 722.

But the other question, whether the vessel be within the port or not, has led to more discussion. If a vessel is taken, neither within the *caput portus*, nor within that part of a haven or roadstead where ships usually unload, the underwriter is not discharged from his liability, by reason of such a warranty, whether the seizure be by troops coming in boats from the land, or by a sea force. This seems to be the result of all the cases, however various the facts, which must necessarily differ. The cases on this point are *Jarman* v. *Coape*, 13 *East*, 394. *Mellish* v. *Staniforth*, 3 *Taunt*. 499. *Dalgliesh* v. *Brooke*, 15 *East*, 295. *Levy* v. *Vaughan*, 4 *Taunt*. 387. *Keyser* v. *Scott*, 4 *Taunt*. 660.

One of these cases merits a different and more full consideration. The warranty was from loss by confiscation of the government in the ship's port of discharge. Upon the arrival of the ship in the roads of *Pillau*, within the *Prussian* dominions, which was intended to be the ship's port of discharge, she was boarded by two different parties, one of Levi v. Allnutt, 15 East, 267.

(a) Where a policy of insurance contained a warranty of this kind, if the ship, to avoid such a seizure, run to sea, before she is properly loaded, and is, in consequence, obliged to go to a port out of the course of the voyage insured, Lord Chief Justice *Gibbs* held that the underwriters are not liable for a subsequent loss; for this is expressly avoiding a loss to which the underwriters were not liable, and incurring another at the risk of the underwriters. *O'Reilly* v. *Royal Exch. Assur. Comp.*, 4 *Campb*. 246. But where there is no such warranty, the underwriters would be liable. *O'Reilly* v. *Gonne*, 4 *Campb*. 249.

Prussian soldiers; and the other, the crew of a *French* privateer, who disputed the possession, but agreed to take her into *Pillau*, to settle their claims. The *Prussian* government referred the matter to the *French* government at *Paris*, where the ship was condemned as prize to the *French captors*, and afterwards given up to them. There was no doubt that this was a seizure in port: but the question was, whether this was a *confiscation* by the *government in the ship's port of discharge*, viz. *Prussia*, so as to discharge the underwriters. Lord *Ellenborough* said, the conduct of the *Prussian* government shewed her vassalage subjection to *France*, but this never could be deemed an act of *confiscation* by that government. It only shewed a permission that *France* should do as she pleased in the *Prussian* ports; and to hold this to be a *Prussian* confiscation would be saying that every country on the Continent, too weak at this period to protect its independence against *France*, confiscated all the property, which the *French* chose to take within its territories. The other judges concurred, Mr. Justice *Le Blanc* observing, that as well might it be said, if the vessel had been captured at sea by the *French*, and taken into a *Prussian* port, and there appropriated to the use of the captors, that would be a confiscation by the *Prussian* government.

Brown v. Tiernay, 1 Taunt. 517.

Before any of the above cases had been decided, the Court of Common Pleas determined that where there was such a warranty, if the capture was by a land force, no matter for what purpose she went into port, the underwriter was discharged: but that this vessel was not in port, being in the open road, though in the place where vessels usually unload some part of their cargo, to enable them to cross the bar. But this case can hardly stand with those since decided; and in *Dalgliesh* v. *Brooke*, 15 *East*, 295., Lord *Ellenborough* said he could not agree to it in any respect. And Lord Chief Justice *Mansfield*, who decided *Brown* v. *Tiernay*, in afterwards giving judgment in *Levy* v. *Vaughan*, 4 *Taunt.* 387. candidly admits that *Brown* v. *Tiernay* and *Dalgliesh* v. *Brooke* cannot stand together; and the judgment in *Levy* v. *Vaughan* follows the latter decision.

But

But although the judges have been thus liberal in their constructions of this contract, and have gone as far as possible to effectuate the intention of the parties; yet they have never extended those equitable principles to such a length as to say, that when a man has insured one species of property, he shall recover damage which he has suffered by the loss of a description of property different from that named in the policy. Thus a man, who has insured a cargo of goods, cannot recover under such a policy, the freight which he has paid for the carriage of that cargo; nor shall it be permitted to an owner of a ship, who insures the *ship merely*, to demand satisfaction for the loss of merchandize laden thereon, or to ask from the insurers *extraordinary wages paid to the seamen, or the value of provisions consumed*, by reason of the detention of the *ship* at any port longer than was expected.

Such attempts have, indeed, been made, but they have always been resisted; for to admit of such demands would introduce an infinite variety of frauds, and would be repugnant to the most settled maxims of insurance law, and to the constant practice and usage of trade. In *Molloy* it is said, that if a merchant insure a ship generally, and the ship then happen to be laden, and if it afterwards miscarry, the insurer shall not answer for the goods, but only for the ship. This position stands uncontradicted by any foreign writer ancient or modern, and is supported by several decisions of the first authority in this country.

Molloy, b. 2. c. 7. s. 8.

Roccus de Assecur. Not. 16.

In an insurance *upon the ship Tartar* at and from *London* to *Newcastle* and *Marseilles*, and at and from *Marseilles* to her discharging port or ports in the *West Indies*, (*Jamaica* excepted,) the facts were, that the ship being distressed bore away for *Minorca*, and put into *Port Mahon*, where the captain obtained leave from the Vice-admiralty Court to have his ship surveyed, in consequence of which, she was long detained; and the action was brought to recover the extraordinary wages, and the provisions expended during the detention for these repairs.

Fletcher and others v. Poole, Sitt. after East. 1769, before Lord Mansfield at Guildhall.

Lord *Mansfield* was of opinion, that such articles as sailors' wages and provisions expended, while a ship is detained to refit,

refit, can never be allowed as a charge against the insurer *on the ship;* and a verdict was accordingly given for the defendant.

Baillie v. Moudigliani, B. R. Hil. 25 G. 3.

In another cause, after a trial at *Guildhall*, a special case was reserved for the opinion of the Court, stating, that this was an action upon a policy of insurance *on goods* at and from *Nevis* to *Bristol*. The ship sailed from *Nevis;* but, before her arrival at *Bristol*, she was captured and taken into *Morlaix*, and there condemned. An appeal was lodged in the parliament of *Paris*, where the sentence was reversed, and the ship and cargo were decreed to be restored. Before the sentence of restitution, the ship and cargo had been sold; but the money was paid, the charges of prosecuting the appeal being deducted. The defendants have paid all the charges of the suit, and the salvage, except the sum now in demand, which was paid by the plaintiffs, as owners of the goods, to the owner of the ship for *freight pro ratâ itineris:* and for which *freight* this action is brought on the policy on goods.

After time taken to deliberate, Lord *Mansfield* delivered the unanimous opinion of the Court for the defendants: the *item* now in litigation, His Lordship said, is that which was paid for freight by the owner of the cargo to the proprietor of the ship *pro ratâ itineris*. The question is, Whether he can charge these underwriters for it? As between the owners of the ship and cargo, in case of a total loss, no freight is due; but as between them no loss is total, where part of the property is saved, and the owner takes it to his own use. In this case, the value of the goods was restored in money, which is the same as the goods; and therefore freight was certainly due *pro ratâ itineris*. But as between the owners of the goods, and the underwriters *upon the cargo*, the latter have nothing to do with the *freight*. The owner of the ship has a lien for his freight; but in a total loss, literally so called, no freight is due. In case of a loss, total in its nature, with salvage, the owner of the goods may either take the part saved, or abandon; but in neither case can he throw the freight upon the underwriters; because they have not engaged to indemnify him against it.

This

This also was an action on a policy of insurance, which was on the *ship and goods* from *Ostend* to *Dominique*. The following facts appeared in evidence: that the ship met with bad weather, and was in great distress; that the crew threatened to take the command from the captain unless he would make for the first port; that he then went to *Ferrol* to repair his ship, and by the time the repairs were finished, the crew forsook her; that he then got another crew, and at the moment he was going to sail, the *Spanish* governor stopped him; that after a detention of 37 days she was discharged, and then arrived at *Dominique*. This action was brought for the expence incurred by wages, provisions, *&c.* during the demurrage at *Ferrol*. On the part of the insurer it was contended, and so held by Mr. Justice *Buller*, who presided upon that trial, that the freight, and not the ship, is liable for this loss, and that the charge of demurrage could not be allowed upon this policy. The plaintiff was nonsuited. Eden v. Poole, Sitt. after Hil. 1785.

Agreeable to the above doctrine, there is a decision of the whole Court of King's Bench. It was an action on a policy of insurance, on the ship *Dumfries*, at and from *London* to *Africa*, during her stay and trade there, and at and from thence to her port or ports of discharge in the *British West India* islands, to recover a partial loss. The facts were, that this ship, in the course of the war, after performing her voyage to *Africa*, in coming from thence, laden with slaves to the *West Indies*, touched at *Barbadoes* in *December* 1781, for the purpose of watering, at which island an embargo was laid on all ships by order of Lord *Hood*, the commander-in-chief upon that station; and the vessel was detained a considerable time. The captain applied for leave to depart, but was refused; whereupon he attempted to sail away privately in the night, but was pursued by the *Salamander* sloop of war, and after a slight engagement he was brought back, the *Dumfries* not having sustained any damage, for which the underwriters could be charged, on account of a clause exempting them from partial losses, not amounting to 3 *per cent.* Lord *Hood*, in consequence of this breach of embargo, upon her return took almost all the men out of the *Dumfries*, dispersed some of the crew among the ships of war: the captain and the rest of the crew were confined; and the ship Robertson v. Ewer, 1 Term Reports, p. 127.

ship was detained at *Barbadoes* till the *April* following. This detention, however, was not proved to have arisen solely from the embargo, as it appeared that, for some part of the time, the small pox prevailed among the slaves, and that the embargo was frequently taken off and renewed between *December* and *April*. The action was brought to recover from the insurer *upon the ship* the additional *wages* paid to the seamen, and the *charges for provisions* during this detention.

Mr. Justice *Buller* was of opinion, at the trial, that the only damages proved, being items for seamen's wages, provisions, and demurrage, during the detention, could not be recovered under this policy on the ship only. To make the underwriter liable there must be a loss of the ship, for the policy is on the body of the ship only; and if she arrive safe at her port of delivery, be the voyage ever so long, you cannot recover under such a policy: if, indeed, she be in such a state as to prevent her from completing her voyage, it is certainly a loss. The plaintiff was nonsuited.

In the following term a motion was made to set aside the nonsuit, which, after argument, was refused by the whole Court to be done, and upon that occasion Lord *Mansfield* said, "There is no authority to shew, that on this policy the insured can recover for such a loss, but it is contrary to the constant practice. On a policy on a *ship*, sailors' wages or provisions are never allowed in settling the damages. The insurance is on the *body of the ship*, tackle, and furniture; *not on the voyage or crew*. In this case it is admitted, that there was no damage done to the ship, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."

Mr. Justice *Buller*. — "I take it to be perfectly well settled, that you are not to recover on a policy on the body of the ship for seamen's wages or provisions: these are not the subject of the insurance. The case put at the bar proves the rule. For if the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good that damage, yet you could not have come upon him for the amount of wages or provisions

visions during the time she was so repairing. Here the ship itself is safe; and the Court only look to the thing itself which is the subject of insurance; and the wages and provisions are no part of the thing insured."

The doctrine contained in the preceding cases was much discussed, and by some supposed to be considerably shaken by a decision of the Court of King's Bench in the year 1791; where it was unanimously held by the learned judges, that *provisions* sent out in a ship for the use of the crew are protected by a policy of insurance on the *ship and furniture*. In the argument of that case the judges at first thought it fell within the principle of decision in *Robertson* v. *Ewer*, which they were determined to support: but the grounds of distinction between the two decisions are stated with so much clearness and perspicuity, and the effect of usage upon this species of contract so well ascertained, that I feel it my duty not to abridge the arguments adopted by the court.

It was an action on a policy of insurance on an *East India* and *China* ship, and on the tackle, ordnance, ammunition, artillery, and *furniture of the ship*. At the trial before Lord *Kenyon* at *Guildhall*, it appeared that while the ship was lying off *Bank-saul Island*, in the river *Canton*, it became necessary to refit her, for which purpose the *stores and provisions* were taken out of her, and put into a warehouse, called a bank-saul, and that while they were in the warehouse, they were destroyed by an accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the use of the ship's crew: but if those provisions were not protected by the policy, then there was not an average loss of 3*l. per cent.* It was considered in the same light as if the accident had happened on board the ship. For the defendant it was contended, that the provisions were not protected by the insurance; but one of the jury said, it had been determined in Lord *Mansfield*'s time, that they were included under the word *furniture*, under which decision the merchants had since acquiesced; on which the plaintiffs obtained a verdict.

Brough v. Whitmore, 4 Term Rep. 206.

See ante. p. 67.

A motion, founded upon this objection, was afterwards made to set aside the verdict, and an inquiry was ordered respecting the case alluded to by the juryman; and the argument was fully entered into at the bar.

Lord *Kenyon*, after observing on the loose and ambiguous terms of policies of insurance, said, "The question here arises on the meaning of the word "*furniture*;" one of the jurymen said, and in that he is now confirmed, that according to the understanding of those who enter into these contracts, it includes *the provisions for the use of the crew*. Now, among the several accidents against which the defendant insured, *are perils by fire*; and this ship being at *Canton*, it became necessary to refit her, and to take out all her goods and land them on this island, where the accident happened: by which these provisions, with the rest of the goods, were burned; and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelly* v. *The Royal Exchange Assurance Company*. Then if these provisions be insured as part of the out-fit of the ship, and they were consumed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy; and consequently the defendant is liable. But it was said in the argument, that the instant any of the provisions were consumed on board, there could not be a total loss; but the short answer to that is, that that comes within the wear and tear of the ship, and it might as well be said, that if a mast were a little injured there could not be a total loss. If this decision were to militate against any determination, or even an *obiter dictum*, of Lord *Mansfield*, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson* v. *Ewer* is clearly distinguishable from the present: here the goods were consumed by an accident by fire on board the ship, (for the island was for this purpose equivalent to the ship,) and within the meaning of the policy of insurance; but in that case they were consumed *by the negroes during a detention* of the ship."

Mr. Justice *Ashhurst*.—"The case cited is not like the present, for the reason given; and I think that this loss comes within

within the terms of the policy. It is an undertaking to insure against all accidents which will prevent the provisions being applied to the purpose for which they were intended. These provisions were part of the out-fit; they were consumed by fire, (one of the accidents against which the defendant insured,) and consequently could not be applied to the purpose for which they were put on board."

Mr. Justice *Buller*.—"I am clearly of opinion, that the underwriters on the body and furniture of the ship are liable to pay the amount of these provisions, which were bought to replace those which were consumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is sufficient to say, that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage. Now it is perfectly clear, that in every instance where losses have been settled, the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way; the underwriters have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions; the value of the ship alone comprehends all these articles; but though the underwriters have a right to examine the ship itself, in point of fact they do not, because they know, from experience, the quantity of provisions necessary for the crew for the intended voyage; and if that value be stated to them in the ordinary way, they sign their names immediately without making further inquiries. Then if the provisions be included in a policy on the ship, and the ship and all the provisions be lost, the underwriters must make good the whole loss, whether it be a valued or an open policy. But it has been said that, if an accident happen after some of the provisions are consumed, the underwriters are entitled to a deduction to the amount of such provisions: I will answer this, first, as the argument applies to a valued, and then to an open policy. As to the first; from the nature of the policy, the provisions are not insured against all events; they are only insured against particular risks. Again, there is nothing from which there can be salvage; if the body of the ship and every thing on board be sunk, or burned, there can

 be

be no salvage. And, in the case of an open policy, the insured must prove by evidence what was the value of the whole, and then the same reasons apply as in the case of a valued policy: With respect to the case of *Robertson* v. *Ewer*, which has been relied on: I thought at first that it applied strongly to the present; and if I still entertained the same opinion, I would not, on account of any usage to the contrary among underwriters, overturn a solemn determination of this Court: but that case, and the two others there mentioned, are clearly distinguishable from the present. In all those the insured wished to charge the underwriters with the amount of the provisions consumed, during the time when the ships were detained. Of those therefore it is sufficient to say, that an insurance is *on the ship for the voyage:* but, during a detention, the ship is not proceeding; and therefore the underwriters are not liable. This case also differs from that of *Robertson* v. *Ewer* in another circumstance; there the provisions were consumed by the slaves on board, and not by the ship's crew, and the slaves are considered as part of the cargo. The words of Lord *Mansfield* in that case must be taken with a reference to the case then before him. He was then speaking of a charge for provisions used during the detention of the ship, and for the maintenance of the slaves; and he said, "there is no authority to shew that, on *this* policy, the insured can recover for *such a loss:* but it is contrary to the constant practice." Then he proceeded to say, on a policy on a ship, sailors' wages or provisions are never allowed in settling the damages. Now, even if those latter words be taken in their general sense, and not confined to the case immediately before the Court, they are accurate; for "provisions" *eo nomine* are not taken into consideration. In general, the captain of a ship takes on board provisions sufficient for the voyage; and if he be detained in any port, and he be a prudent man, he will not use what are called the ship's stores during his detention, but he will buy others for immediate consumption, during the detention, because he cannot but know that he has the same length of voyage to perform that he had before he was detained: it makes no difference however to the underwriters whether he do so or not; for if the captain be obliged to purchase other stores for the remainder of the voyage, the underwriters are not answerable

for

for these, but only for those which were on board at the time of the insurance, since they only formed a part of the value of the ship. On the whole, therefore, I am of opinion, that there should be no new trial. The cases cited are distinguishable from the present: the usage of merchants, as to the construction of these instruments, stands unimpeached, and therefore it must prevail in this case."

Mr. Justice *Grose* agreed, and the rule was discharged.

In an insurance upon a *Greenland* ship, it became a question, Whether the *lines and tackle* employed in the fishery in those seas could be recovered under a policy made upon *the ship, tackle, and furniture*, &c. This case came before the Court, upon a motion for a new trial, and the judges were unanimously of opinion, that they were not protected by the policy, not being part of the *ship*'s tackle or furniture.

Hoskins v. Pickersgill, B. R. East, 23 G. 3.

It is also necessary, in order to entitle the insured to recover, that the loss which has happened be a direct and immediate consequence of the peril insured, and not a remote one. This doctrine was laid down in a case before Lord *Mansfield*, and the decision of the jury was agreeable to the principle stated by the Chief Justice.

It was an action on a policy of insurance " at and from " *Bristol* to the coast of *Africa*, during her stay and trade " there, and from thence to her port or ports of discharge " in the *West Indies*." There was a memorandum on the policy, " that the assurers are not to pay any loss that may " happen in boats during the voyage, (mortality by natural " death excepted,) and not to pay for mortality by mutiny, " unless the same amount to 10*l*. *per cent.*, to be computed " on the first cost of the ship, out-fit and cargo, valuing ne" groes so lost at 35*l*. per head." The demand upon the policy was the loss of a great many slaves by mutiny. The evidence of the captain was, that he had shipped 225 prime slaves on board: that on the 3d of *May*, before he sailed from the coast of *Africa*, an insurrection was attempted; that the women seized him on the quarter deck, and endeavoured to throw him overboard, but he was rescued by the crew; that

Jones v. Schmoll, Guildhall, Tr. Vac. 1785, 1 T. Rep. p. 130. Note (*a*). See also Hodkinson v. Robinson, Chap. on Abandonment; and 3 Bos. & Pull. 388.

the women and some men threw themselves down the hatchway, and were much bruised. That he sent the ringleader on shore, and twelve men and a woman afterwards died of those bruises, and from abstinence: that on the 22d of *May* there was a general insurrection, the crew were forced to fire upon the slaves, and attack them with weapons, it being a case of imminent necessity. Several slaves took to the ship's sides, and hung down in the water by the chains and ropes, some for about a quarter of an hour, three were killed by firing, and three were drowned, the rest were taken in, but they were too far gone to be recovered; many of them were desperately bruised, many died in consequence of the wounds they had received from the firing during the mutiny, some from swallowing salt water, some from chagrin at their disappointment, and from abstinence; several of fluxes and fevers; in all to the amount of 55. The underwriter had paid at the rate of 15 *per cent.* for 19, who were either killed during the mutiny, or had afterwards died of their wounds. Another consequential damage was stated, that the mutiny had lessened the remaining slaves in the estimation of the planters, and reduced their price.

Lord *Mansfield* said, " As to the latter loss, I think the underwriter is not answerable for the loss of the market, or the price of it: that is a remote consequence, and not within any peril insured against by the policy.

" The question for the jury will be, Whether any of those who died by any other means, except by being fired upon, or in consequence of the wounds and bruises which they received during the struggle, are within the meaning of the policy which insures against damage by mutiny? This policy is in the common form, and if it were not for the memorandum, I should say, the case was not within the instrument. But as it now stands it is very clear, that those who were killed by the firing, or died in consequence of their wounds, are within the policy; the other complicated cases must be left to the jury. The first class, such as were killed in the fray, certainly come within the meaning of the policy; and the second class also, those who died of the wounds they received. The third class are, I think, as clearly not within it,

such

such as being baffled in their attempts, in despair chose a mode of death, by fasting, or died through despondency: that is not mortality by mutiny, but the reverse, for it is by *failure of mutiny*. The great class are such as received some hurt by the mutiny, but not mortal, and died afterwards of other causes, as those who swallowed water, jumped overboard, *&c.* This is the great point."

The jury found, that all who were killed in the mutiny, or died of their wounds, were to be paid for. That all those who died of their bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for. That all who had swallowed salt water, and died in consequence thereof, or who leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin, were not to be paid for.

In the construction of policies of insurance for time (*a*), which are very frequent, the same liberality, equity, and good sense, have always prevailed, as in all other insurances: and the Courts have gone, as far as possible, to decide according to the intention of the parties.

In an action on a policy of insurance on the ship *Mary*, a letter of marque, the words of the policy were, "at and from "*Liverpool* to *Antigua*, *with liberty to cruise six weeks*, and to "return to *Ireland*, or *Falmouth*, or *Milford*, with any prize "or prizes." The ship having been taken, this action was brought, and came on to be tried before Mr. Baron *Hotham* at *Lancaster*, when a verdict was found for the plaintiffs.

Syers and others v. Bridge, Doug. 509.

Upon a motion for a new trial, the material parts of the evidence were, that the policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or the duration of the voyage. The captain of the ship, being called on the part of the plaintiffs, swore that he in fact sailed from *Liverpool* on the 28th of *February*: he was

(*a*) By the act of 35 *G.* 3. *c.* 63. *s.* 12. no policy upon any ship, or interest therein, shall be made for any longer term than twelve calendar months. See ante, p. 45.

five days before he cleared the land; and he proceeded on his direct voyage till the 14th of *March*, chasing, however, at different times, from the 7th to the 14th, at which time he began his cruise, giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. From the 14th of *March*, he continued cruising about the same latitude till the 17th or 18th of *April*: when he discontinued the cruise, of which he also gave notice, intending to go to the *Burlings*, off *Lisbon*, in the course of his voyage. On the 23d he renewed the cruise, of which he gave notice as before, and ordered a minute, to that purpose, to be entered in the log-book. From that time he continued cruising till the 28th of *April*, when he was taken by an *American* privateer. Many witnesses were examined; some of whom thought, that the liberty of cruising given by the policy, meant six successive weeks; others conceived, that if the separate times of cruising, when added together, should not exceed the space of six weeks, the terms of the insurance would be complied with: but none of them could prove any usage, as none of the witnesses ever knew a case exactly circumstanced like the present.

Lord *Mansfield*.—" This was merely a question of construction, on the face of the policy, and unless a usage could have been shewn in favour of this desultory cruising, calling witnesses to support it, was calling them to swear to mere opinion. None of those produced knew of any instance; and therefore their evidence ought not to have been received. Yet, I dare say, their testimony had great weight with the jury. The meaning of words depends upon the subject. The instructions were not read, but they shew the meaning very clearly, for they run thus: 'To cruise six weeks, and *then* proceed to *Antigua*.' There can be no general rule. Here the subject-matter, in my opinion, is decisive to shew, that the six weeks meant one continued period of time. A cruise is a well-known expression for a connected portion of time. There are frequently articles for a month's cruise, a six weeks' cruise, *&c.* Such a liberty, as in this case, to a letter of marque, is an excuse for a deviation. But what was contended for by the plaintiffs is impossible in practice. Suppose the ship returns *directly back*, cruising for the space of a week.

week. She may then perhaps take three weeks to return to where she had been. Can she then renew the cruise, return again, and so repeatedly? The voyage, in that way, might last for years. But the true meaning is, 'I will excuse a deviation for six weeks.' The instructions, although it happens they were not read, strike me much. Another argument: Six weeks is a continuation, a congregate denomination of time. If they had meant separate days, they would have said forty-two days." The rule for a new trial was made absolute.

Having said thus much of construction in general, by which it appears, that the material rules to be adhered to, are the intention of the parties entering into the contract, and the usage of trade; it will be proper to consider more particularly, what shall be construed a loss within the meaning of the policy. This mode of treating the subject naturally leads us to consider losses by perils of the sea; losses by capture, and by detention of princes or people; and losses by the barratry of the masters or mariners; which are the great divisions of perils insured, and which will furnish materials for the three following chapters.

CHAPTER III.

Of Losses by Perils of the Sea.

THE subject-matter of this chapter may be reduced to a very small compass; as very few questions have ever been agitated in the *English* courts of law upon this point. It may, in general, be said, that every thing which happens to a ship, in the course of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the sea. Thus in an insurance against perils of the sea, every accident happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, or by any other violence which human prudence could not foresee, nor human strength resist, may be considered as a loss within the meaning of such a policy; and the insurer must answer for all damages sustained, in consequence of such accident. But if a ship be driven by stress of weather on an enemy's coast, and is there captured, it is a loss by capture, and not by perils of the sea. This was ruled by Lord *Kenyon* in an action on a policy against capture only, and the ship was driven by a hard gale of wind on the coast of *France*, and was there captured, but she did not receive any damage by the wind. Lord *Kenyon* said, this was clearly a loss by capture, for had she been driven on any other coast than that of an enemy, she would have been in perfect safety. The plaintiff had a verdict. (*a*)

1 Shower, 325. Roccus, Not. 64.

Green v. Elmslie, Peake, 212.

The

(*a*) In moving a ship from one part of a harbour to another, it became necessary to send two of the crew on shore to make fast a new line, and to cast off a rope, by which the ship was made fast, those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore, and was lost. Mr. Justice *Heath*, Mr. Justice *Rooke*, and Mr. Justice *Chambre*, held this to be a loss by perils of the sea within the policy, contrary to the opinion of Lord Chief Justice *Mansfield*.

Hodgson v. Malcolm, 2 New Rep. 336.

In

The same point was decided where a ship warranted free from *American* condemnation, was driven on the *American* shore, and there seized and condemned. The underwriters were discharged.

Lion v. Janson, 12 East, 648.

In cases where the loss is not total, but only partial, arising from a leak, from the stranding of the ship, or from the loss of her masts, cables, or rigging, the insurers upon the cargo are liable to restore the value of all the damaged goods, and the underwriter upon the ship is also answerable for all the injury which she has sustained.

1 Mag. 52. 76.

In charter-parties, if the vessel freighted was robbed or taken by pirates, that was held to be a loss within the meaning of the words "perils of the sea." It is also said, that the same rule of construction prevails as to policies of insurance. That possibly might, and would be the true construction upon those words; but as it is now the universal custom to insure against the attacks of pirates, by express words inserted in the policy, that question can now hardly arise.

2 Roll. Abr. 248. pl. 10. Comberbatch, 56.

Although the courts in this case, as in all others, will endeavour to give effect to this species of contract, by a liberal and equitable construction; yet they will be cautious not to extend the principle so far as to say, that the acts of the parties shall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and see that the loss, which is proved to have happened, is really one of those risks against which the underwriter has insured.

An action was brought upon a policy of insurance for the value of certain slaves insured by that policy. The declaration stated, "that by perils of the sea, contrary winds, currents, and other misfortunes, the voyage was so much retarded, that a sufficient quantity of water did not remain "for the support of the slaves, and other people on board,

Gregson v. Gilbert, B.R. Easter, 23 G. 3.

In an insurance upon goods where a ship is actually wrecked, part of the goods lost and part got on shore, but whilst on shore are destroyed and plundered by the inhabitants, so that no part of them again comes into the possession of the assured, Lord Chief Justice *Gibbs* was of opinion this was a loss by perils of the sea.

Boudrett v. Hentigg, 1 Holt, 149.

 "and

"and that certain of the slaves, mentioned in the declaration, "perished for want of water." The facts appearing in evidence were, that the ship, being bound from *Guinea* to *Jamaica*, had missed the island, and the crew were reduced to great distress for want of water: that the captain consulted with the crew, and it was unanimously agreed upon that some of the slaves should be thrown overboard, in order to preserve the rest: that at the time this resolution was formed, there remained but one day's full allowance of water, at two quarts *per* man. The jury, upon this evidence, found a verdict for the plaintiff, with damages at 30*l.* a head for every slave thrown overboard.

A motion was afterwards made for a new trial, upon the ground that this was not a loss by perils of the sea.

Lord *Mansfield*.—"This is a very uncommon case, and deserves a further consideration. There is great weight in the objection, that the loss is stated, by the declaration, to have arisen from the perils of the sea, and that the currents, *&c.* had made the ship foul and leaky. Now, does it appear by evidence that the ship was foul and leaky? On the contrary, the loss happened by mistaking *Jamaica* for another place. Besides, a fact has been mentioned by the counsel of throwing some overboard after the rain fell, a fact which is not agreed on by both sides, though a very material one."

Mr. Justice *Buller*.—"The declaration does not, in any part of it, state the loss which has been the occasion of this demand; and it would be very mischievous if we were to overturn this objection. Suppose, for a moment, that the underwriters, in some cases, are liable for the mistake of the captain, yet, if they are not liable in others, the nature of the loss must be stated in the declaration, that the defendant may have an opportunity of moving in arrest of judgment, if it be not sufficiently alleged. But it would be impossible for the defendant in this case to move in arrest of judgment: for the facts of the case, as proved, are different from these stated in the declaration. The point of law in arrest of judgment can only be argued from the facts stated on record; and the declaration in this case states the loss of the plaintiff to have hap-

happened by perils of the sea." The rule for a new trial was made absolute, on payment of costs.

A loss occasioned by another vessel running down the ship insured is a peril of the sea. Smith v. Scott, 4 Taunt. 126.

The Court of King's Bench have been of opinion, that where a vessel was sunk at sea, by another vessel firing upon her, mistaking her for an enemy, if not a peril of the sea, as some of the judges thought, was a loss within the policy, as being a peril, loss and misfortune, under the general words of the policy, sustained in the course of her navigation on the sea. Cullen v. Butler, Mich. 57 G. 3.

In an insurance upon slaves against *perils of the sea*, their death by failure of sufficient and suitable provision, though that failure was occasioned by extraordinary delay in the voyage from bad and stormy weather, was holden not to be a loss within the policy by perils of the sea, but a loss by natural death, which cannot now be insured against since the statutes for regulating the manner of carrying slaves in *British* vessels from the coast of *Africa*, by *which it is provided, that no loss or damage shall be recoverable on a policy on account of the mortality of slaves by natural death or ill treatment, or against loss by throwing overboard of slaves on any account whatsoever*, &c. Tatham v. Hodgson, 6 Term Rep. 656. 30 G. 3. c. 33. s. 8. 34 G. 3. c 80. 39 G. 3. c. 80. s. 24.

In an action on a policy of insurance at and from *Saint Bartholomew* to the coast of *Africa*, and during her stay and trade there and back to *Saint Bartholomew*, it was attempted, under a count for a loss by *perils of the sea*, to recover for a total loss of the ship, which appeared to have been destroyed by a species of worms which infest the rivers of *Africa*. An intelligent merchant swore, that he had known *many instances* of this species of loss, but that the underwriters had invariably refused to pay. Lord *Kenyon*, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loss by perils of the sea. Rohl v. Parr, Guildhall. Sitt. after Hil. 1796.

If a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she has foundered at sea.

The

Green v. Brown, 2 Stra. 1199.

The ship *Charming Peggy* was insured in 1739, from *North Carolina* to *London*, with a warranty against captures and seizures, and in an action the loss was laid in the declaration to be by sinking at sea. All the evidence given was, that she sailed out of port on her intended voyage, and had never since been heard of. Several witnesses proved, that in such a case, the presumption is, that she perished at sea, all other sorts of losses being generally heard of. It was insisted for the defendant, that as captures and seizures were excepted, it lay upon the plaintiff to prove, that the loss happened in the particular manner declared on. But Lord Chief Justice *Lee* said, it would be unreasonable to expect certain evidence of such a loss, where every body on board is presumed to be drowned: and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given. He therefore left it to the jury, who found according to the plaintiff's declaration.

Newby v. Read, Sittings after Michaelmas, 3 G. 3.

The same doctrine was held in a more modern case before Lord *Mansfield*. It was an action of covenant on a deed, in the nature of a policy of insurance, by which the defendant was bound to insure against any loss happening before the 30th of *November* 1762, free from average. The ship sailed from *Newcastle* to *Copenhagen*, which is usually about ten days' voyage. She was soon after taken by a *French* privateer, but ransomed; and she then proceeded on her voyage to *Copenhagen* (as was proved by the ransomers) in a bad condition. She was never heard of afterwards, though all due diligence had been used; and several ships, which sailed after her, were proved to have arrived safe at *Copenhagen*.

Lord *Mansfield* told the jury, that this evidence was a sufficient ground to presume that she perished at sea, unless the contrary appeared. The jury accordingly found for the plaintiffs.

I have not been able to find any regulation in the law of *England*, or the usage of merchants, fixing a limited time, within which the assured may demand payment for his loss, in case no accounts arrive of the ship upon which insurance is made. Indeed, from the nature of the thing, what shall be a reasonable

reasonable time in such cases, must always depend upon a variety of obvious circumstances. I understand, however, a practice has prevailed among insurers, which seems reasonable enough, that a ship shall be deemed lost if not heard of in six months after her departure (or after the time of the last intelligence from her) for any part of *Europe*; and in twelve months, if for a greater distance. The only objection to such a practice is, that the latter period does not seem sufficient in *India* voyages. However, that is a matter for the insurer's consideration; and even if he should pay the money under a mistake, supposing the ship lost when it really is not, he might, as we shall see hereafter, if the insured were unwilling to refund, recover it back, in an action for money had and received to his use.

Salk. 22.

Vide post, c. 20.

In *Spain* and *France*, this matter, however, is not left to uncertainty; but the time, within which such *losses* may be demanded, is fixed and ascertained by express regulations. By the ordinances of the former, if any ship insured on going to, or coming from the *Indies*, is not heard of in a year and a half after her departure from the port where she loaded, it is declared that she is, and shall be deemed lost: by those of the latter it is said, that if the insured receive no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for those at a greater distance, make his cession to the underwriters, and demand payment, without being obliged to produce any certificate of the loss.

2 Magens, 33.

2 Magens, 177. Ord. of Lewis 14. t. 21. art. 58.

CHAPTER IV.

Of Losses by Capture and Detention of Princes.

CAPTURE, as applied to the subject of marine insurances, may be said to be a taking of the ships or goods belonging to the subjects of one country by those of another, when in a state of public war. What shall be considered as a capture, so as to render an insurer liable under a policy insuring against captures, has now become a question of very little difficulty. (*a*)

2 Burr. 694. 1st point in Goss v. Withers. The law upon this subject is perfectly settled in *England*, between the insurer and the insured; and it is this, that the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy: and the insurer must pay the value. If, after a condemnation, the owner recover or retake her, the insurer can be in no other condition than if she had been retaken or recovered before condemnation. The insurer runs the risk of the insured, and undertakes to indemnify; he must therefore bear the *loss* actually sustained, and can be liable to no more. So that if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expence in getting her back, the insurer must pay
2 Burr. 696. the loss so actually sustained. No capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time, he will be en-
29 G. 2. c. 34. s. 24. 33 G. 3. c. 66. s. 42. titled; and by late acts of parliament, if an *English* ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution upon stated salvage. This

(*a*) The owners of a vessel, who by performing the stipulations of a charter-party, provoke confiscation by the illegal and piratical act of a foreign state, may recover against the insurers, declaring their loss to be by *forcible seizure and capture of persons unknown. Sewell* v. *Royal Exch. Assur. Co.* 4 *Taunt.* 856.

chance

chance does not, however, suspend the demand for a total loss upon the insurer: but justice is done by putting him in the place of the insured, in case of a recapture.

It is not lawful to insure against *British* capture, and therefore such an insurance would be void; but it is not a crime, and therefore the policy would only be void *pro tanto.* Lubbock v. Potts, 7 East, 449. and Glover v. Cowie, 1 M. & S. 52.

These principles, which are agreeable to the ideas of foreign writers, were settled by Lord *Mansfield*, and the whole Court of King's Bench, in *Goss* against *Withers*, (which will be cited at length when we come to treat of abandonment,) and which have never since been disputed. It has likewise been held, that where a capture has been made, whether it be legal or not, the insurers are liable for the charges of a compromise made *bonâ fide*, to prevent the ship from being condemned as prize. It is true, the only case I have been able to find where this point came directly in question is a *nisi prius* note; but when we consider the high authority from which this doctrine is taken, and that the thing in itself is not at all repugnant to the general principles of the law of insurance, it certainly has a claim to our attention. Rocci Selecta responsa, Resp. 34. 2 Burr. 683.

It was an action on a policy of insurance on a *Dutch* ship, called the *Tyd*, and its cargo, at and from *Saint Eustatius* to *Amsterdam*, warranted a *Dutch* ship, and the goods *Dutch* property, and not laden in any *French* port in the *West Indies.* The cargo was worth 12,000*l.* and was insured at a premium of fifteen guineas *per cent.* which was advanced to this high rate on account of the number of captures made by the *English* of neutral vessels, on suspicion of illicit trade, and the detention of those vessels by the proceedings in the Courts of Admiralty. The defendant underwrote 82*l.* of the plaintiff's, for a premium of 12*l.* 18*s.* 3*d.* In *May* 1758, the ship was at *Saint Eustatius* taking in her cargo, which consisted of sugar and indigo, and other *French* commodities, which were put on board her, partly out of barks from sea, partly from the shore of the island. On the 18th of *June* 1758, she sailed on her voyage; on the 27th she was taken by an *English* privateer and carried into *Portsmouth*. On the 1st of *August* the sailors were examined upon the standing interrogatories Berens v. Rucker, 1 Black. 313.

gatories prescribed by the statute 29 *Geo.* 2. c. 34. and the captain entered his claim in the Admiralty court. In *October* 1758, the claimants were cited to specify what part of the goods was taken from the shore of *Saint Eustatius*, and what from the barks. Citation was continued from court to court till *February* 1759, when an interlocutory decree was pronounced for the contumacy of the claimants in not specifying, and that therefore the goods should be presumed *French* property. There was an appeal to the Lords Commissioners of prizes: but as many causes stood before it, as the market was very high, and as the cargo was in part perishable, the agent of the owners agreed with the captors to give them 800*l.* and costs, to obtain the reversal of the sentence. The reversal was had by consent, and, in order to give costs to the captor, it was decreed by consent, that there was a sufficient cause for seizure; and thereupon costs were decreed to the captors, and restitution of the cargo to the owners was also ordered. The ship, when restored, proceeded to *Amsterdam*; and after her arrival there, the Chamber of Insurances in that city settled the average of the plaintiff towards the loss and expences at 14*l.* 3*s.* 8*d.* occasioned by the capture, detention, and litigation; and for this sum the action was brought.

Lord *Mansfield*.—" The first question is, Whether this was a just capture? Both sentences are out of the case, being done and undone by consent. The capture was certainly unjust. The pretence was, that part of this cargo was put on board off *Saint Eustatius*, out of barks supposed to come from the *French* islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the *Dutch* shore, and then put on board afterwards; in which case there is no colour for seizure. The rule is, that if a neutral ship trade to a *French* colony, with all the privileges of a *French* ship, and is thus adopted and naturalized, it must be looked upon as a *French* ship, and is liable to be taken. Not so, if she have only *French* produce on board, without taking it in at a *French* port; for it may be purchased of neutrals.

" Second question is, Whether the owners have acted *bonâ fide* and uprightly, as men acting for themselves, and upon

a reasonable footing; so as to make the expences of this compromise a loss to be borne by the insurers. The order of the Judge of the Admiralty to specify was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; because if they had specified, it could be of no consequence, according to the rule I before mentioned. The captors were, however, in possession of a sentence, though an unjust one: and a Court of Appeal cannot, or seldom does, upon a reversal, give costs or damages, which have accrued subsequent to the original sentence; for these damages arise from the fault of the Judge, not of the parties. Under all these circumstances, therefore, the owners did wisely to offer a compromise. The cargo was worth 12,000*l.*; the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negotiated the compromise; the Chamber of Commerce at *Amsterdam* ratified it, and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I therefore think the insurers liable to answer this average loss, which was submitted to in order to avoid a total one." The jury found for the plaintiff, agreeably to the above direction. (*a*)

By the positive provisions of two acts of parliament, 22 *Geo.* 3. c. 25. and 33 *Geo.* 3. c. 66. s. 37, 38, and 39. it is declared illegal for the captains or owners of any *British* ships who are captured, to ransom themselves from the enemy, and the contract to ransom is not only declared absolutely void, but the parties entering into them are punished by fine. And by a still later act, 43 *Geo.* 3. c. 160. s. 34, 35, and 36. the above provisions are continued: and by the 33d sect. if any captain of a privateer shall agree to ransom any ship, or cargo taken as prize, and shall in pursuance of such agreement set the prize at liberty, instead of bringing the same into the ports of His Majesty's dominions, unless in a case of extreme necessity to be allowed by the Court of Admiralty, he shall forfeit his letter of marque, and shall suffer such penalties of fine and imprisonment, as the said Court shall adjudge. It

(*a*) In *Tyson* v. *Gurney*, 3 *Term Rep.* 477. this case was quoted without contradiction; and the point, in support of which it was adduced, was held accordingly.

would

would follow as a necessary consequence, that no sum paid on such account could be recovered from the underwriters.

Havelock v. Rockwood, 8 Term Rep. 268 See S. C. post, ch. 9 and 18. on another point.

Upon this principle the following decision has taken place: The ship *Themis* was insured for 12 months, and during that period was captured and carried into *Bergen* in *Norway*, and there condemned by the *French* consul. After this sentence, the ship was put up to publick auction at *Bergen*, by the publick officer of the Court of *Denmark*, having been previously advertised, and was re-purchased by the agent of the plaintiff; and for this re-purchase money the plaintiff insisted, (if not entitled to recover as for a total loss,) he was at all events entitled to a verdict.

As to the decision of this point, see post, c

The Court, after hearing two arguments, were unanimously of opinion, that as the sentence of the *French* consul in a neutral country was contrary to the law of nations, and void, the property never was devested out of the original owner; and that therefore the money paid for the re-purchase was in the nature of a ransom. The ransom acts are remedial laws, and in the construction of such acts, it is the rule to extend the remedy so as to meet the mischief; and the legislature intended to prevent such a transaction as the present taking place, because it would take away the chance of recapture. The circumstances of this being done *by an agent*, at an *auction*, and *on* land, were deemed immaterial, the acts of parliament not having described at what places, or in what form a ransom is prohibited, but having prohibited ransom in general terms, the case was thought to come within the mischiefs against which those statutes were meant to guard.

But though the law upon the subject of capture in insurances is so clearly defined, that at this day it seems almost impossible to raise a question, yet it formerly occasioned much doubt and litigation, what effect a recapture might have upon this kind of contract; and how long it was necessary for goods to remain in the hands of the enemy, in order to devest the original proprietor of his property in case of a re-capture.

All

All these doubts are now entirely removed, and can never again be agitated in this country, between an insurer and insured: Lord *Mansfield*, for himself and his brethren, having declared, in giving judgment in *Goss* v. *Withers*, that these questions could never have been started in policies *upon real interest*, because, as we have seen, they never could have varied the case. But wager policies gave rise to them; for it was necessary to set up a total loss, as between third persons, for the purpose of their wager, though *in fact* the ship was safe, and restored to the owner. His Lordship laid down the same doctrine in *Hamilton* v. *Mendes*: the consequence of which is, that as wager policies are now expressly prohibited by statute, these questions can never arise upon a policy of insurance.

2 Burr. 695.

Vide beginning of this chap.

2 Burr. 1108.

19 G. 2. c. 37.

The only two possible cases in which they can be material are: 1st, Between the owner and a neutral person who has bought the capture from the enemy; and, 2dly, Between the owner and recaptor: But whatever rule ought to be followed in favour of the owner, against a recaptor or vendee, it can no way affect the insurance between the insurer and insured.

2 Burr. 693.

Notwithstanding this point is now, as far as relates to our present inquiry, no longer a subject of uncertainty, it cannot but afford pleasure to the mind, and, I trust, it will not be considered as impertinent, to trace the opinion of foreign writers upon this question, and to state briefly several cases which have been decided in our Courts of law here, upon capture and recapture, previous to the statute of 19 *Geo.* 2.

It seems to be generally agreed by foreign writers, that it is not every taking and subsequent possession under that taking, which will constitute a capture in the legal sense of the word, or make it become the property of the captor; but that there must be a firm possession. In this they all agree; but what shall be such a possession, as to vest the absolute property in the captor, is so much a matter of doubt, that it is difficult to find two writers of the same opinion. Upon this subject various lines have been drawn by arbitrary rules, partly from policy, to prevent too easy dispositions to neutrals; and partly from equity, to extend the *jus postliminii* in favour

of

2 Burr. 695. of the owner. And it is not to be wondered at, that there is so great an uncertainty and variety of notions amongst the writers on this subject, about fixing a positive boundary by the mere force of reason, where the subject-matter is arbitrary, and not the object of reason alone.

Grotius de jure belli, lib. 3. c. 6. *Grotius* is of opinion, that the captor shall be said to have the property in him as soon as the former owner shall have lost the hope of recovery and the ability to pursue, and that property shall then be said to be *taken*, when it is brought within the enemy's fortress. Whence it follows as a consequence, that in marine captures the capture shall be deemed complete when the ships or goods taken shall be brought within the harbour or ports of the enemy, or to that place where their whole fleet is stationed; for then the recovery may be despaired of. But by a more recent law introduced among the *European* nations, it seems that that only is deemed a capture which has been twenty-four hours in the possession March, 110. of the captor. The former part of this opinion, I find, was adopted in a case in *March's* Reports, where it is said that the property is not altered unless it be brought *infra præsidia* of the enemy: and some nations have made twenty-four hours quiet possession by the enemy the criterion of their judgment. Ord of Lew. s 34. art. 8. Thus by the ordinances of *Lewis* the Fourteenth it is declared, that if any of the ships of *French* subjects be retaken from their enemies, after having been twenty-four hours in their hands, they should be good prize: and if it be before twenty-four hours, they shall be restored to the owners, with all that is in them, and one-third shall be given to the ship that retakes them. Bynkershoek quæst. publ. juris. lib. 1. c. 4. *Bynkershoek*, however, states the opinion of *Grotius*, controverts it with much ability, and seems to think, that the *spes recuperandi* is the ground on which the question is to be decided. He mentions the opinion of some writers, who think that it is necessary for the ship to have arrived in the enemy's port, to have been condemned, to have sailed out again, and arrived in a friend's port, before the property can Roccus Not. 66. 2 Black. Com. 401. be said to be changed. *Roccus* rather states the various opinions of others than asserts one of his own; but he seems to lean to the idea, that it is necessary to bring the ship within the confines of the captor, and to keep it there a night in 2 Burr. 694. safe custody. But, as was said by Lord *Mansfield*, all these circumstances

circumstances are very arbitrary, and therefore are generally exploded.

By the marine law of *England*, as practised in the Court of Admiralty previous to the passing of any act of parliament, which commanded restitution, or fixed the rate of salvage, it was held, that the property was not changed so as to bar the owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. Agreeably to this principle, judgment was given in that Court, decreeing restitution of a ship retaken by a privateer, though she had been fourteen weeks in the enemy's possession. Another case also, upon the same principle, was decided against the vendee after a long possession, two sales, and several voyages. 2 Burr. 694.

Thus stands the marine law of *England*, by which it appears that the *jus postliminii* continues till condemnation, which, by the acts of parliament about to be quoted, is extended, and now continues for ever.

By the statutes of the 13th *Geo.* 2. c. 4. and 29th *Geo.* 2. c. 34. ships or vessels of His Majesty's subjects, which had been captured by the enemy, and were retaken, either by men of war or privateers, were decreed to be restored to the original owners, upon paying for salvage the sums mentioned in the statutes, and the quantum of salvage to be paid to privateers was made to depend upon the length of time which the recaptured vessel had been in the enemy's hands; such salvage, however, never being allowed to exceed a moiety of the value.

By the last prize acts this distinction is abolished, and the rate of salvage payable in all cases is fixed to one-eighth of the value, if the recapture is made by any of His Majesty's ships, and to one-sixth, if by a privateer or other ship. 33 G. 3. c. 66. s. 42. & 43 G. 3. c. 160. s. 39.

The words are, "that if any ship or vessel, or boat taken "as prize, or any goods therein, shall appear and be proved "in any Court of Admiralty having a right to take cogni-"zance thereof, to have belonged to any of His Majesty's "subjects of *Great Britain* or *Ireland*, or any of the domi-

" nions and territories remaining and continuing under His
" Majesty's protection and obedience, which were before
" taken or surprized by any of His Majesty's enemies, and
" at any time afterwards again surprized and retaken by any
" of His Majesty's ships of war, or any privateer or other
" ship, vessel, or boat, under His Majesty's protection and
" obedience, that then such ships, vessels, boats, and goods,
" and every such part and parts thereof as aforesaid, formerly
" belonging to such His Majesty's subjects, shall in all cases
" (save in such as are hereafter excepted) be adjudged to be
" restored, and shall be, by decree of the said Court of Ad-
" miralty, accordingly restored to such former owner or
" owners, or proprietors, he or they paying for and in lieu
" of salvage (if retaken by any of His Majesty's ships) one-
" eighth part of the true value of the ships, vessels, boats, and
" goods respectively, so to be restored; which said salvage of
" one-eighth shall be answered and paid to the flag officers,
" captains, officers, seamen, marines, and soldiers in His Ma-
" jesty's said ship or ships of war, to be divided in such manner
" as before in this act is directed touching the share of prizes
" belonging to the flag officers, captains, officers, seamen,
" marines, and soldiers, where prizes are taken by any of
" His Majesty's ships of war: and if retaken by any privateer
" or other ship, vessel, or boat, one-sixth part of the true
" value of the said ships, vessels, boats, and goods; all which
" payments to be made to the owner or owners, officers, and
" seamen of such privateer, or other ship, vessel, or boat,
" shall be without any deductions, and shall be divided in
" such manner and proportions as shall have been agreed on
" by them as aforesaid; and in case such ship, vessel, or
" goods shall have been retaken by the joint operation or
" means of one or more of His Majesty's ships, and one or
" more private ship or ships, then the judge of the High
" Court of Admiralty, or other court having cognizance
" thereof, shall order and adjudge such salvage to be paid to
" the recaptors, by the owner or owners of such retaken ship,
" vessel, or goods, as he shall, under the circumstances of the
" case, deem fit and reasonable; which salvage so to be ad-
" judged shall be accordingly paid by the owners of such re-
" taken ship, vessel, or goods, to the agents of the recaptors,
" in such proportions as the said Court shall adjudge; but if
" such

"such ship or vessel so retaken shall appear to have been, "after the taking by His Majesty's enemies, by them set "forth as a ship or vessel of war, the said ship or vessel shall "not be restored to the former owners or proprietors, but "shall in all cases, whether retaken by any of His Majesty's "ships, or by any privateer, be adjudged lawful prize for "the benefit of the captors."

From hence it is clear, that by the marine law received and practised in *England*, there is no change of property, in case of a capture, before condemnation; and that now, by the acts of parliament just referred to, in case of a recapture, the *jus postliminii* continues for ever, unless the ship so retaken shall appear to have been set forth by His Majesty's enemies as a ship of war, in which case she shall be deemed good prize to the recaptors. However, as has been already said, the change of property is not at all material as between the insurer and the insured, upon policies of real interest, which are the only policies that can now by law be effected.

I proceed then to state the cases which were determined upon this point, on wager policies, previous to the act of parliament prohibiting such insurances.

The first case is one in the 10th year of Queen *Anne*'s reign, in which the facts upon a special verdict appeared to be, that the plaintiff had insured a certain sum of money upon a ship, called the *Ruth*, in a certain voyage, *in which ship the plaintiff was found not to be at all interested.* It happened that this ship was taken by the enemy, and kept in their possession for nine days, and then before it was carried *infra præsidia*, it was retaken by an *English* man of war. Upon these facts, the question was, Whether or not this was such a taking as should enable the plaintiff to recover the sum insured against the defendant?

Assievedo v. Cambridge, 10 Mod. 77.

After argument, the Court seemed to think (but a second argument was ordered, which does not appear from any reporter ever to have been made), that the defendant was entitled to judgment.

2 Burr. 695. Upon this case Lord *Mansfield* has observed, that the man of war which retook the ship, brought her into the port of *London*, and restored her to the owner upon reasonable redemption; that this appears from the special verdict, although it is not stated in the printed case; and then, as the owner did not abandon the ship, he could only have come upon the insurers for the redemption; and no question could have arisen upon the change of property. Besides, the policy being interest or no interest, without benefit of salvage, the question arose upon the terms and meaning of the wager. But that case was not determined.

Depaiba v. Ludlow. Comyn's Rep. 360. This also was an action of *assumpsit*, on a policy of insurance, where the defendant insured the plaintiff, *interest or no interest*, against all enemies, pirates, takings at sea, and all other damages whatsoever. And upon trial it appeared, that the ship was taken by a pirate of *Sweden*, and was in his possession for nine days, and was then retaken by an *English* man of war, and after the suit commenced, was brought into *Harwich*. The question was, Whether, in such a case, the defendant was responsible?

It was determined for the plaintiff. But although it was objected that the insurer was only responsible where the plaintiff had a property, and that the term of insuring, *interest or no interest*, was introduced since the Revolution; yet it was said, that such insurance was good, and the import of it is, that the plaintiff has no occasion to prove his interest, and that the defendant cannot controvert it. And though the ship was here retaken, yet the plaintiff received a damage, for his voyage was interrupted; and the question is not, Whether the plaintiff had his ship, and did not lose his property, but what damage he sustained?

2 Burr. 695. Lord *Mansfield* has also observed upon this case, that it was a wager policy, and the property could not be changed, for there was then no war, or declaration of war; that the Court held, that as the ship was once taken in fact, the event had happened though she was afterwards recovered. His Lordship said, that the same observations were applicable to the case of *Pond* v. *King*.

This

This was an action on a policy of insurance upon the *Salamander* privateer (of which the plaintiff was part owner), from the *Downs* to any port or place where she should sail for three months from the 1st of *December* 1744, *interest or no interest*, free from average, and without benefit of salvage; the insurance was against such perils as are usually mentioned in policies; the breach assigned is, that the *Salamander* was taken by a *French* ship of war within the three months, and was wholly lost, whereby she could not prosecute her voyage or cruise. The jury found a special verdict, stating, that the *Salamander* was taken by a *French* ship of war within the three months; that 117 of her men were taken out of her, and carried into *France*, and her guns taken out, and that she remained in the possession of the enemy from four o'clock in the afternoon of the 2d of *February* till five o'clock in the afternoon of the 5th of *February*; that before she was carried into any port she was retaken by an *English* privateer, and by the captain of the privateer kept eight days upon the high seas without sailing, and at the end of eight days the captain of the privateer took a *French* prize, and, together with her and the *Salamander*, endeavoured to come into some *English* port, but the wind not permitting, he carried them into *Lisbon*; that the *Salamander* remains there for the benefit of those to whom she belongs; that the plaintiff is interested, exceeding the sum insured; that the ship was prevented from finishing her three months' cruise by the capture, but that she was a living ship at the end of three months: that *Lisbon* is a neutral port; that the master of the privateer obtained a decree in the Court of Admiralty at *Gibraltar*, that the ship should be restored to the owners on payment of one-third part for salvage.

Pond v. King, 1 Wils. 191. and Lex Merc. red. 4th edit. 302.

Lord Chief Justice *Lee*, after two arguments, delivered the unanimous opinion of the whole Court: "The question is, Whether the capture of this ship, which was never carried *infra præsidia hostis* before she was retaken, and upon the matter as found by the verdict, shall be considered as a total loss, so as to entitle the insured to recover the whole sum insured? And although by the civil law it may not perhaps be adjudged a total loss, yet the rules of that law are not to govern us, but we must give our judgment according to the

common law of *England*, and upon this agreement between the parties, whose intention appears, and must guide us. By the civil law, there must be a total loss to entitle the assured to recover, but the policy in this case extends to captures and other accidents. The meaning of the parties here is plain: the insured paid his premium in consideration of the insurer's undertaking, that the *Salamander* should cruise safely during three months; the jury have found that she was disabled from prosecuting her cruise for three months. We are all of opinion for the plaintiff, and that this is not an average, but a total loss to the insured: the insurance is to be understood for the voyage of three months, and in common sense it cannot be otherwise; so that as soon as the voyage is broken or interrupted, it is at an end. Safety during the three months is what is meant; but it appears that the ship was taken and detained within that time, and that the plaintiff was hindered in his cruise; and this, by our law, is a total loss to the plaintiff. I have avoided saying any thing whether this was a prize or not, as having never been carried *infra præsidia hostis*, because we are all of opinion that this is a total loss."— Judgment for the plaintiff.

Spencer v. Franco, coram Lord Hardwicke, Dec. 1736. Lex Merc. red. 4th edit. p. 316.

In the case of *Spencer* v. *Franco*, the plaintiff had caused himself to be insured on the *Prince Frederick*, from *Vera Cruz* to *London*, *interest or no interest*, free of average, and without benefit of salvage. The ship was afterwards seized by order of the viceroy of *Mexico*, and the *Spaniards* turned her into a man of war, called the *Saint Philip*, and sent her as commodore, with a squadron of *Spanish* men of war, to the *Havannah*, they having first taken out the *South Sea* Company's arms, and made several alterations in her, and there was a war between *England* and *Spain*, and *Gibraltar* was actually besieged by the *Spaniards*. The defendants proved the signing of preliminary articles of peace before the seizure of the ship, and therefore insisted, that this seizure did not alter the property, and consequently the defendants were not liable: for if the property was not altered, this insurance made by the plaintiff, who had no interest, cannot bind, as nothing comes within the policy but a total loss: and though there be those general words in the policy, *restraint or detainment of princes*, Lord Chief Justice *Hardwicke* declared, that a war might

might begin without an actual declaration or proclamation, as in this case, by laying siege to *Gibraltar*, a garrison town; that as a war may begin by hostilities only, so it may end by a cessation of arms; and these preliminary articles being signed before the seizure of the ship, and there being a cessation of arms, he thought the ship being taken afterwards, not to be a taking by enemies, unless the jury took the caption to begin from the time the *South Sea* arms were seized, which was before the articles: that supposing the ship not taken by enemies, whether his detention for near the space of a year was, in this sort of policies, *viz. interest or no interest*, a detention within the policy; or whether in such policies the insurers are ever liable but in case of a total loss; and if so, this ship being afterwards restored, then he directed the jury to find for the defendants, which they accordingly did.

In another case, the insurance was on goods by the *Dursley* galley, *interest or no interest*, at and from *Jamaica* to *Bristol*. In her passage she was taken by a *Spanish* privateer, and carried into *Mores*, a port in *Spain*, kept eight days, and then cut out by an *English* ship. The plaintiff insisted, that this insurance, though on goods, was to be considered as a wager on the bottom of the ship: and therefore brought his action for a total loss. The defendant said, that by the stat. of 13 *Geo.* 2. c. 4. the ship is to be restored to the owners upon paying salvage, and consequently this is only an average loss; and the plaintiff can only recover upon a total one. Lord Chief Justice *Lee* held, that the plaintiff ought to recover: for this is a wager upon a total loss in the voyage, and here has happened one; for being carried into port and detained eight days makes one. Where the policy is, "*interest* "*or no interest*," the provisions of the act in cases of valued policies cannot take place. The act does not declare that the property is not gone by such a capture, but only provides for restoring the ship to whom it did, and shall be proved to have belonged. He said, it might be otherwise, where the ship was recaptured, before it was carried *infra præsidia*, or in case of goods actually on board, and upon a valued policy.

Dean v. Dicker, 2 Str. 250.

An

Whitehead v. Bance, B. R. Mich. 1749. An assurance was made on the *Dispatch* galley, *interest or no interest*, free of average, *&c.* from *Jamaica* to *Hull.* In her voyage she was taken by a *French* privateer, and carried into *Hamburgh*, and after being twelve days in the hands of the enemy, she was retaken by an *English* ship, and brought to *London*, where she was adjudged to be restored to the owner, paying salvage. The owner sold the ship, and paid the salvage. An action being brought on the policy, it was held to be a loss of the voyage; and a verdict was given accordingly.

These cases have been laid before the reader, without any comments, except such as have occurred from time to time to Lord *Mansfield*, as he has had occasion to mention them; and it was the less necessary to observe upon each particular case, as one general observation is applicable to all, namely, that they were not policies upon *real interest.* Let it suffice then to repeat, that at this day, in cases of capture, the underwriter is immediately responsible to the insured. But if the ship be recovered before a demand for indemnity, the insurer is only liable for the amount of the loss actually sustained at the time of the demand: or if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits and advantages resulting from such restitution. All these regulations certainly have their foundation in the great principles of equity and justice; an observation which must be obvious to every one who recollects, that a policy of insurance is nothing more than a contract of indemnity.

33 Geo. 3. c. 66. s. 44. 43 Geo. 3. c. 160. s. 41. Before the subject of capture and recapture is closed, it may be proper to mention, that by the late prize acts, if a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, with consent of the recaptors, to prosecute her voyage, and it shall not be necessary for the recaptors to proceed to an adjudication till six months, or till her return to the port from which she sailed; and it shall be lawful for the master, owners, *&c.* with consent of the recaptors, to unliver and dispose of the cargo before adjudication: and in case the vessel shall not return directly to the port from which she sailed, or the recaptors shall have had no opportu-

nity

nity of proceeding to adjudication within the six months, on account of the absence of the said vessel, the Court of Admiralty shall, at the instance of the recaptors, decree restitution to the former owners, paying salvage upon such evidence as to the said Court, under all the circumstances of the case, shall appear reasonable, the expence of such proceeding not to exceed the sum of fourteen pounds.

Having thus endeavoured to explain the nature of captures by an enemy, as far as they affect the subject of insurances, I proceed now to treat of losses arising from another species of capture, namely, by detention; a part of our enquiry which will not demand a long or tedious discussion. The underwriter, by the express terms of his contract, is answerable for all loss or damage arising to the insured, "*by the arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality whatsoever.*"

The only question then is, what shall be considered as such detention: and indeed the words used are so large and comprehensive, as hardly to admit of a doubt even upon that head. The learned *Roccus* is of opinion "*ut si merces captæ a potestate, seu judice justitiam administrante in illo loco, aut a populo, aut ab aliâ quâcunque personâ per vim, absque pretii solutione, tenentur assecuratores solvere æstimationem dominis mercium, factâ prius per dominos mercium cessione ad beneficium assecuratorum pro recuperandis illis mercibus, vel pretio ipsorum a capientibus.*" In another place he says, "*Regis et principis factum connumeratur inter casus fortuitos; ideo si rex et princeps retineant navem oneratam frumento ex causâ penuriæ, quapropter navis non potuerit frumenta asportare ad locum destinatum, tenentur assecuratores.*" Roccus de assec. Not. 54. Roccus de assec. Not. 65.

Malyne lays down the law to be, that the insurers are liable for all losses by arrests, detainments, *&c.* happening both in time of war and peace, committed by the public authority of princes. And Lord *Mansfield* has said, that the insured may abandon in case merely of an arrest or embargo by a prince, not an enemy; and consequently such an arrest is a loss within the meaning of the word *detention*. Malyne, 110. 2 Burr. 696.

What

Nesbitt and another v. Lushington, 4 Term Rep. 783.

What the word "*people*," in this clause of a policy of insurance, means, has lately been judicially settled in a case, where the declaration claimed a loss of corn, occasioned *by the unlawful arrest, restraint, and detention of people to the plaintiffs unknown.* The facts upon this part of the case were, that the ship being forced into *Ely harbour* in *Ireland*, and a great scarcity of corn happening to be there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her, till they had compelled the captain to sell almost all the corn considerably below the invoice price. The word *people*, it was contended at the bar, meant individuals of a nation as opposed to magistrates or rulers.

Lord *Kenyon*. — "That which happened in this case does not fall within the meaning of "arrests, restraints, and detainments of kings, princes, and people." The meaning of the word *people* may be discovered here by the accompanying words, *noscitur a sociis*; it means "*the ruling power of the country*.""

Mr. Justice *Buller*. — "I cannot agree with the construction put at the bar upon the word *people*; it means *the supreme power*; *the power of the country*, whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of "*pirates, rogues, thieves*:" then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of "kings, princes, and *people* of what "nation, condition, or quality soever." Those words, therefore, must apply to *nations* in their collective capacity.

Lex Merc. red. 4th edit. 260.

An embargo is an arrest laid on ships or merchandize by public authority, or a prohibition of state commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. This term has also a more extensive signification, for ships are frequently detained to serve a prince in an expedition, and for this end have their loading taken out, without any regard

regard to the colours they bear, or the princes to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports, that may contribute to the success of his enterprise. Embargoes laid on shipping in the ports of *Great Britain*, by royal proclamation, *in time of war*, are strictly legal, and will be equally binding as an act of parliament; because such a proclamation is founded on a prior law, namely, that the king may prohibit any of his subjects from leaving the realm. But in times of peace the power of the King of *Great Britain* to lay such restraints is doubtful; and therefore where such a proclamation issued in the year 1766, against the words of a statute then in force, although absolutely necessary for the prevention of a dearth in this country, it was thought prudent to procure an act of the legislature to indemnify those who advised, or who acted under that proclamation.

Grot. de jure belli, lib. 2. cap. 2. s. 10. 1 Black. Com. 270.

7 G. 3. c. 7.

In case of detention by a foreign power, which in time of war may have seized a neutral ship at sea, and carried it into port to be searched for enemy's property, all the charges consequent thereon must be borne by the underwriter: and whatever costs may arise from an improper detention, must always fall upon him.

1 Magens, 67.

This was held by *Willes*, *Ashhurst*, and *Buller*, justices, in the absence of Lord *Mansfield*, in a case, the circumstances of which are as follow: It was an insurance on the ship *Thetis*, a neutral ship; and upon the trial a special case was reserved for the opinion of the Court, stating, that the plaintiffs were *Tuscan* subjects, resident at *Leghorn*, sole owners of the ship *Thetis*, which sailed from *Leghorn*, and was captured by a *Spanish* ship off the coast of *Barbary*, with neutral goods on board, consigned to *London*. She was condemned as prize in the Court of Vice Admiralty in *Spain*, which sentence was reversed; but upon another appeal to a superior Court, the latter sentence was also reversed, and the former confirmed. The grounds of condemnation were two: 1st. That the ship *Thetis* refused to be searched, and resisted with force, having fired at the *Spanish* ship. 2dly. That she had

Saloucci v. Johnson, B. R. Hil. 25 G. 3.

had no charter-party on board. The captain of the *Thetis* answered these two grounds: 1st. That he resisted and fired, because the *Spaniard* hailed him under false colours. 2dly. That he had taken the goods on board by the piece, and had not freighted his ship to any individual; in which case a manifesto was sufficient without a charter-party. The sentence of the last court of appeal, although it condemns, admits the neutrality, for it states the vessel to be "*a Tuscan ship.*" The last ground relative to the charter-party was not insisted upon. Upon the other, the three learned judges above mentioned were of opinion, *that a neutral ship is not obliged to stop to be searched* (*a*); that the captain had not been guilty of barratry; that the searcher stops a neutral ship at his peril: that this was to be considered as a case of improper detention, and consequently that the plaintiff upon this policy was entitled to recover.

But though an underwriter is liable for all damage arising to the owner of the ship or goods from the restraint or detention of princes, yet that rule shall not be extended to cases where the insured shall navigate against the laws of those countries, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for non-payment of
2 Vern. 176. customs. This was so ruled by Lord Commissioner *Hutchins* in Chancery, in the year 1690; and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and that no man shall take advantage of his own misconduct. If indeed any of those acts were committed by the master of the ship, without the knowledge
Vide the next chapter. of the insured, the underwriter would be liable, if not for losses by detention, at least for a loss by the barratry of the master, to which such conduct would most certainly amount.

It has been a question, whether the insurers are liable for the payment of damage arising by the detention or seizure of

(*a*) This opinion of the learned judges does not seem to be well founded. But I shall hereafter state the argument more at length, in chap. 18., when I shall have occasion to refer to a very learned and elaborate judgment of Sir *W. Scott*, the Judge of the Admiralty, upon this point; and a subsequent decision of the Court of King's Bench upon the subject. Post.

ships

ships by the government of the country in whose ports the ship loads. Till lately there was only one common law case where this point was expressly in issue, and that was not decided.

In evidence upon the trial in an action upon a policy of insurance, the case appeared to be, that the insurer agreed to insure the ship from her arrival at ——— in *Jamaica* during her voyage to *London*; and an embargo was laid upon the ship by the government; who afterwards seized the ship, converted her into a fire-ship, and offered to pay the owners. The question was, if this would excuse the insurers? *Holt*, Chief Justice, seemed to incline, that it would not, and that this was within the words, *detention of princes, &c.* but he gave no absolute opinion, the cause having been referred to three of the jury. Green v. Young, 2 Ld.Raym. 840. 2 Salk. 444.

The very general words made use of in policies go to support the idea entertained by Lord *Holt*, and although till lately there was no case where this point was expressly considered, yet it seems to have been taken as settled in many cases, which have come before the court. One instance immediately occurs, in the case of *Robertson* v. *Ewer*, which was cited in a former chapter. There, an embargo had been laid by Lord *Hood* on all shipping at *Barbadoes*; and it does not appear to have been doubted or questioned at the bar, that the insurer was liable for any loss which might have been sustained by such detention, provided the loss had happened to any of the property specifically insured. It is true, that it is declared by the ordinances of *France*, "that if any ship be "stopped by our orders in any of the ports of our kingdom "*before the voyage be begun*, the insured shall not, on account "of this detention, abandon or cede their effects to the in-"surers." A similar regulation is to be found in *Bilboa*, by which it is ordered, "that if any ship or ships insured, with "or without goods, shall be detained by His Majesty's order "in the ports of these kingdoms of *Spain*, *before the com-"mencement of the voyage she is bound on*, it shall be judged "that no cession can be made of them, but rather the in-"surance in such case ought to be held null." If these ordinances, when they use the words, "commencement of the

Vide ante, p. 91.

2 Magens, 176.

2 Magens, 417.

 "voyage,"

"voyage," mean commencement of the risk insured, they agree with the laws of *England* (a); because the underwriter can never be answerable for any thing happening before that period: but when the risk insured is "at and from," if the ship be detained in the loading port, by order of the state, before her departure for the voyage, but after the risk commenced, the insurer by our law is liable for the damages occasioned by such detention, as the words in the policy do in themselves import no restriction to restraints and embargoes by foreign or hostile powers only.

Rotch v. Edie, very fully reported in 6 Term Rep. 13.

This question came on lately for consideration in the Court of King's Bench; and it was unanimously decided in favour of the assured after two arguments at the bar. But the learned Judges desired not to be considered as deciding upon the effect of an embargo laid on by our own sovereign upon ships loading in this country. The question came before the Court upon a special case reserved for its opinion, upon the trial of an action on a policy of insurance on three ships, the *Adelaide*, *Adele*, and *Victor*, their stores, boats, and fishing materials, *&c.* upon two of them at and from *L'Orient*, and upon the third, at and from and after her arrival at *L'Orient*, and on all of them, "to all ports, seas, and places whatsoever, "beyond and on this side the Capes of *Good Hopé* and *Horn*, "on the southern whale and seal fishery and trade, and "until the ship's arrival back at *L'Orient*." The loss is stated by the declaration to have happened by the ships and their stores and provisions being, by authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, arrested and restrained from further prosecuting their voyages, and that they had thence hitherto been prevented and restrained therefrom under and by virtue of such restraint. The case stated that the ship *Adelaide* sailed from the port of *L'Orient* on the voyage insured, but was obliged to

(a) The *French* policies on the ship always attach only from the day the ship sails, unless the parties vary the general rule by a particular agreement. See the ordinances in 2 Magens, 168, 169. See *Pothier's Traité du Contrat d'Assurance*, chap. 1. sect. 2. article 2. where the distinction I have taken in the text is also made.

put

put back by stress of weather into *Port Louis*; and whilst she lay there, and the ships *Adele* and *Victor* were preparing for the voyages in the policies mentioned, and before the necessary passports and clearances could be obtained, on the 5th *February* 1793, an embargo was laid on all vessels in those ports. That the *Adelaide* was brought back to *L'Orient*, and the perishable stores of all the three ships sold; and the said three vessels with the rest of the stores now remain at *L'Orient*, under the embargo, which has continued ever since on all ships destined on long voyages; and none have since been permitted to sail, except those in government service or upon short coasting voyages. The *Adele* and *Victor* had entered outwards upon the voyages insured, when the embargo came; and that alone prevented the ships from sailing. Notice of abandonment was given to the underwriters on the 27th *Feb.* 1793, and a total loss claimed; and the like notice and claim were repeated in *August* 1793. (*a*)

Lord *Kenyon*. — " I have looked into all the cases which have been cited, and I have also considered the passages collected from foreign writers, and the most respectable of them seem to me to coincide with the construction which an *English* court of justice would put upon such an instrument as the present. This plaintiff is under no disability to sue, and the defendant has entered into an engagement to indemnify him against arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever. By this peril, the ship has been detained near three years, and the voyage is defeated; but the plaintiff is to be told this is not a loss within the policy. No common man reading the words of the policy could doubt upon the question: and it is by artificial reasoning only, collected by great reading upon foreign authors, that his claim can be repelled. But in truth, when examined, the research turns out to be all one way, and that is in favour of the plaintiff. *Roccus*, *Le Guidon*, *Green* v. *Young*, from Lord *Raymond*, are

(*a*) Some other facts were stated; but as the effect of them was to shew that the plaintiff was either an alien enemy, or in partnership with an alien enemy; and as the facts did not support the argument which was to be raised upon them, and did not form an ingredient in the judgment of the Court, I forbear to state them.

 all

all one way: and although Lord *Holt* is said not to have given an absolute opinion, every thing that fell in judgment from that great man is deserving of the highest attention. Lord *Mansfield* too has given an opinion upon the very point (2 *Burr.* 696. and ante, p. 123.); and when to this current of authorities we add the words of the policy itself, it is perfectly clear. Suppose war had been declared, and the ship had been detained in port as a prize, could there have been a doubt? and I can see no difference between the cases.

The other Judges delivered their opinions *seriatim*, concurring unanimously with His Lordship; and there was judgment for the plaintiff. (*a*)

In

(*a*) In deciding the above case, the learned Judges expressly declined giving an opinion upon the effect of an embargo laid by the government of this country upon a ship insured here. The case of *Green* v. *Young*, above stated, was indeed an embargo by the *British* government. The very point arose, and came on for argument upon a special case in a cause of *Bischoff* v. *Agar*, in *East.* Term 1797. But it not being stated whether the abandonment was made in a reasonable time, and the Court inclining to think the abandonment should be in the first instance, they sent the case back for the jury to find that fact: and upon the second trial the jury, having found that the abandonment was not made in due time, gave a general verdict for the defendant; and the main question respecting the embargo was not decided. But during the late war in *Europe*, it became necessary for the courts to decide this question; for in *Touteng* v. *Hubbard*, 3 *Bos. & Pull.* 291., where the point arose upon a charter-party, Lord *Alvanley*, referring to the above case of *Bischoff* v. *Agar*, declared it to be the opinion of the whole Court, that a *British* merchant is not liable to answer for any damages which the owner of a foreign vessel may sustain from *an embargo laid by the British government* on foreign ships, in the nature of reprisals and partial hostility. And His Lordship goes on to declare it to be the opinion of himself and his brethren, that an insurance for the benefit of a foreigner, against the effects of such an embargo as that in question, (which was an embargo by the *British* government upon all *Swedish vessels*,) would be illegal. And a distinction was taken between such a case and that of *Green* v. *Young* (ante), which was a question between two *British* subjects. I lament that I cannot here give Lord *Alvanley*'s very able and learned argument entire, and to abridge it would be doing it great injustice; I therefore refer the reader to the Reports of Messrs. *Bosanquet* and *Puller*.

And in a case at Nisi Prius before Lord *Ellenborough*, His Lordship was of opinion, where the assured was a subject of the country, he might recover against a *British* underwriter for the loss sustained by the detention of the *British* government, that being totally different from the case of a foreign assured; for amongst our own subjects, whether the plaintiff or defendant sustain the loss, it cannot prejudice the general interests of the country.

In the above case of *Rotch* v. *Edie*, the assured was neither a subject of the same country with the underwriter, nor of the country laying the embargo: but both these points have since undergone much discussion in our courts, as will appear by the following cases, and by those cases in the notes. The proposition that a foreigner insuring his ship or goods in this country is not entitled to abandon to the underwriters here, because his government has laid an embargo on the property in the ports of the country of the assured, was first laid down broadly in this case. The Court of King's Bench was unanimous in this opinion; and decided the case upon the principle, that every man is a party to the public authoritative acts of his own government; and on that account is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject in a *British* court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. — Lord *Ellenborough*, in delivering this judgment, founded himself chiefly on the doctrine contained in the case of *Touting* v. *Hubbard*, 3 *Bos. & Pull.* 291. After quoting that case, His Lordship said, Where an embargo is laid on, it has virtually the concurrence and consent of *all* the subjects of the country, and amongst the rest, the concurrence and consent of the assured; the assured therefore have joined in a resolution, that the ship shall not be allowed to sail, but shall remain in port; and is it possible for them afterwards to make their not sailing the foundation of an action? *Where the insured and insurer are subjects of the same state, the case will stand upon very different grounds of consideration.*

Conway v. Gray, 10 East, 536.

See Page v. Thompson, Sittings after Hil. 1804. and Visger v. Prescott, 5 Esp. 184.

The Court also held, in the above case, upon the same principle of public policy which governed the decision of the first point, that where a policy is effected on behalf of the consignor, and the conduct of the consignor, or of the state to which he belongs, has taken away from him the right of enforcing it *directly* and *effectually* for his own benefit, the consignee is not at liberty to apply it to *his* interest, and

country. *Page* v. *Thompson*, sittings after *Hil.* 1804, at *Guildhall.* The same point was ruled by His Lordship in *Visger* v. *Prescott*, with respect to neutral property. 5 *Esp.* 184.

 enforce

enforce payment, as though it had been made on his account. The Court did not mean to say, that a *consignee* may not insure; they only meant, as Lord *Ellenborough* declared, that he was so far identified in interest and right with his consignor, as not to be able to apply with effect to his own interest, which is derived from the consignor, an insurance which was effected in order to cover the interest of the consignor, but which, upon the principle already stated, cannot be available for that purpose.

Wolff v. Horncastle, 1 B. & P. 316. p. 362.

The generality of the doctrine laid down in the above case of *Conway* v. *Gray* led to an idea that no circumstances could lead to a different result; that it was wholly immaterial (as was argued at the bar) whether the parties were hostile or neutral; licensed or not licensed by the government of this country to carry on the particular trade; for that if they were answerable *virtually* for the act which occasioned the loss, the assured could not recover against the underwriter.

Usparicha v. Noble, 13 East, 332.

The facts of the case, in which this point was contended for, were, that a native *Spaniard*, domiciled in *England* in time of war between the countries, had been licensed by the King to ship goods in a neutral vessel from *Poole* to *Bilboa* or *Saintander*. The vessel in the course of her voyage was captured by a *French* privateer, (*France* being a co-belligerent with *Spain*, and both nations having issued similar decrees against *British* commerce,) and condemned by a *French* consular court, then sitting in a port of *Spain*. The Court of King's Bench held, that they could, consistently with their decision in *Conway* v. *Gray*, determine this case in favour of the assured, whether for his own benefit or of his correspondent's, though residing in the enemy's country; for the domiciled *Spaniard* was especially licensed by His Majesty, for the purpose of the very commerce which it was the object of the policy declared upon to insure. The case of *Wells* v. *Williams*, 1 Lord *Raym.* 282. establishes that a plaintiff, an alien enemy in respect of the place of his birth, may, under similar circumstances of domicile, be allowed to sue in our courts. The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, *but that the commerce itself is to be regarded as legalized for all*

Lord Ellenborough.

purposes

purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the crown. The crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war; and its licence for such purpose ought to receive the most liberal construction. To say that the plaintiff might export the goods specified in the licence from *Great Britain* to an enemy's country for the benefit of himself *or others*, (and the licence contains no restrictions in this particular,) and yet to hold, that where he has done so he could not insure, or, having insured, could not recover his loss, either on account of his original character of a native *Spaniard*, or on account of the places to which, or of the persons to whom the goods were destined, would be to convert the licence itself into an instrument of fraud and deception. *The Crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end.* For adequate purposes of state policy and public advantage, the Crown, it must be presumed, has been induced in this instance to license a description of trading with an enemy's country, which would otherwise unquestionably be illegal. *Whatever commerce of this sort the Crown has thought fit to permit,* (which in respect of its prerogatives of peace and war, the Crown is by its sole authority competent to prohibit or permit,) *must be regarded by all the subjects of the realm, and by the courts of law, when any question relative to it comes before them, as legal, with all the consequences of its being legal:* one of which consequences is a right to contract with other subjects of the country for the indemnity and protection of such property in the course of its conveyance to its licensed place of destination, though an enemy's country, and for the purpose (as it probably will be in most cases) of being there delivered to an alien enemy, as consignee or purchaser. His Lordship then applied these very satisfactory principles to the case at the bar, and then proceeded: "For the purpose of this licensed act of trading, (but to that extent only,) the person licensed is to be regarded as virtually an adopted subject of the crown of *Great Britain*; his trading, as far as the disabilities arising out of a state of war are concerned, is *British* trading; and of course, any argument to be drawn from a virtual participation in and supposed privity

to the acts of his own native country, then at war with the crown of *Great Britain*, is excluded or superseded in point of effect, by an express privity to and immediate participation in the adverse acts of the *British* government. As far as the plaintiff and the *Spanish* purchasers of this cargo are concerned, they are actually privy to the objects of the *British* government, and acting in furtherance thereof, if in direct opposition to the laws and policy of their own country. And it will not be contended to be illegal to insure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country and its trade; and which this trade in question, sanctioned as it is by His Majesty's licence, must be deemed to have been." I have given Lord *Ellenborough*'s judgment much at length; because the principles laid down in it are fraught with great sense and sound policy, and must be applicable at all times when trade is permitted to be carried on with the subjects of the states at war with this country; and because the decision in *Usparicha* v. *Noble* was adopted, confirmed, and fully relied upon, as founded upon clear, forcible, and unanswerable reasoning, by Lord Chief Baron *Thomson*, in delivering the unanimous judgment of the Court of Exchequer Chamber, in reversing certain judgments of the Court of King's Bench in the cases of *Menett* v. *Bonham*, 15 *East*, 477. *Flindt* v. *Crokat*, 15 *East*, 522. and *Flindt* v. *Scott*, 15 *East*, 525., in which cases it was thought by the Court of Exchequer Chamber, that the Court of King's Bench had not entirely adhered to the principles laid down in *Usparicha* v. *Noble*. It is but right to add, however, that the late Mr. Justice *Le Blanc*, who had concurred in the judgments of *Conway* v. *Gray*, and *Usparicha* v. *Noble*, differed in opinion from his brethren in those subsequent cases. The judgment of reversal is to be found in the 5th volume of Mr. *Taunton*'s Reports, 674. See also *Bazett* v. *Meyer*, 5 *Taunt.* 824., where in a similar case the Court of Exchequer Chamber adhered to their judgment so solemnly pronounced by the Lord Chief Baron in *Menett* v. *Bonham*. In those cases, a licence was granted to *Flindt* and Co. of *London*, merchants, on behalf of themselves and others, to export on board the *Kranick*, (a neutral ship,) bearing any flag, except the *French*, from *London* to *Archangel*, and to import from thence specified goods, notwithstanding all the documents

5 Taunt. 674.

documents may represent the ship to be destined to a neutral or hostile port, and to whomsoever such property may appear to belong. The ship was liberated as neutral, but the goods were condemned by the court of *Russia*, as the property of an enemy.

The Court of Exchequer Chamber held, that this case was governed by the decision in *Usparicha* v. *Noble*; that such a licence authorized the subject of the hostile country, to which the ship was licensed, to export from *London*; and that it was no objection to the agent of such alien enemy recovering for his use, that the loss was occasioned by the act of the hostile trader's own state, for whose acts he was not answerable in this particular traffic, to which he was licensed.

In the course of the very learned argument of Lord Chief Baron *Thomson*, he mentioned several cases as bearing upon it; and to which, for brevity, I shall only refer; as, if I were to give them all at length, this work, instead of giving the principles only, would be swelled with facts, which must necessarily perpetually vary. *Feise* v. *Bell*, 4 *Taunt.* 4. *Fayle* v. *Bourdillon*, 3 *Taunt.* 546. *Morgan* v. *Oswald*, 3 *Taunt.* 554. *Robinson* v. *Touray*, 1 *Maule & S.* 217. *Hagedorn* v. *Reid*, 1 *M. & S.* 567. *Simeon* v. *Bazett*, 2 *M. & S.* 94. *Hagedorn* v. *Bazett*, 2 *Maule & S.* 100. *Hullman* v. *Whitmore*, 3 *Maule & S.* 337. The Court of Common Pleas immediately decided *Anthony* v. *Moline*, 5 *Taunt.* 711. on the above authorities. And finally, to close this point, the principle, though not upon an insurance case, was luminously stated and acted upon in a case of stoppage *in transitu*. It was held that a licence to *British* merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalizing the purchase legalized the sale by the enemy, and impliedly legalized the enemy's right by his agent here to stop *in transitu* after their arrival, upon the intermediate insolvency of the vendee: any other construction of the licence than this, as Lord *Ellenborough* said with his usual force, would be holding out to *Europe* that this country would allure foreigners by the King's licence to send their goods to this country, and then take the goods without paying for them.

Fenton v. Pearson, 15 East, 419.

By what has been said it appears, that before the insured can recover against the underwriter in cases of detention, he must first abandon to the insurers his right, and whatever claims he may have to the goods insured. This point will be fully treated of in the chapter of Abandonment. It will be sufficient here to remark, that in most of the countries on the continent, the time for abandonment in such cases is fixed to a limited period after the event has happened. In *Bilboa* and *France* the cession must be made in six months, if the loss has happened in any part of *Europe*; and within a year, if in a more distant country. A similar regulation as to time is established by the ordinances of *Middleburgh* in *Zealand*. By the law of *England*, there is no positive rule on this subject, consequently an insured has a right to abandon immediately upon hearing of the detention. But it should seem, that in order to prevent the underwriters from being harassed, the insured ought to make his election, whether he will abandon or not, within a reasonable time; and what that shall be, must in general depend upon the circumstances of the case.

2 Magens, 175. 416.

2 Magens, 23.

See the case of Mitchell v. Edie, post, ch. 9. where this point has been considered and settled; and see ante, p. 130. note (*a*), the case of Bischoff v. Agar, where held that the abandonment must be in the first instance.

CHAPTER V.

Of Losses by the Barratry of the Master or Mariners.

IT does not seem to have been any where precisely ascertained, from what source the term *barratry* has been derived.

Indeed the derivations of barratry have rather tended to confound, than to throw any light upon the subject; for its root has been so frequently altered, according to the caprice of the particular writer, that it is impossible to decide which is the true one. The *English*, however, most probably have taken it from the *French*, *barrateur*, which is to be traced to the *Italians*: but where the latter found this word is a thing by no means clear.

Whatever the derivation may be, the word seems to have been originally introduced into commercial affairs by the *Italians*, who were the first great traders of the modern world. In the *Italian* dictionary, the word *barratrare* means to cheat; and whatsoever is done by the master, amounting to a cheat, a fraud, a cozening, or a trick, is barratry in him. *Postlethwaite*, in his dictionary of trade and commerce, defines *barratry* thus; "Barratry is committed when the master of "the ship, or the mariners, cheat the owners, or insurers, "whether it be by running away with the ship, sinking her, "deserting her, or embezzling the cargo." In another place, the same author observes, "one species of barratry in a marine sense is, when the master of a ship defrauds the owners "or insurers, by carrying a ship a course different from "their orders." These definitions are so very comprehensive, that they seem to take in every case of barratry known to the law of *England*, as far as we can collect the principles from the several cases that have been decided. From a review of those cases, and they are but few, it appears that any act

Cowp. 154.

1 vol. p. 224.

1 vol. 136.

1 Stra. 581.

2 Stra. 1173. Cowp. 143. 1 Term Rep. 32. 7 Term. Rep. 505.

act of the master, or of the mariners, which is of a criminal or fraudulent nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the *owners of the ship*, without their consent or privity, is barratry.

Cowp. 155.

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen *in the act of barratry*: that is, it is immaterial whether it take place *during* the *fraudulent* voyage, or *after* the ship has returned to the regular course; for the moment the ship is carried from its right track with a fraudulent intention, barratry is committed.

Lockyer v. Offley, 1 Term Rep. p. 252. Vide ante, c. 2.

But the loss, in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited by the policy, otherwise the underwriters are discharged. Thus, if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and *be there moored at anchor twenty-four hours in good safety*: the underwriters are not liable, if, after this, she should be seized for that act of smuggling.

From the above descriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private interest, no barratry has been committed. I have said, that to constitute barratry, it must be without the knowledge or consent of the owners; because nothing can be so clear as this, that no man can complain of an act done, to which he himself is a party. But it is material to consider, in what sense the word owner is to be understood in this definition. It has been argued, that if *A.* be the owner of a ship, and let it out to *B.* as freighter, who insures it for the voyage; and if the deviation be with the knowledge of *A.* though unknown to *B.*, the insurer is discharged. But the Court over-ruled that argument, and said, that in order to discharge the insurer from the loss by barratry, it must appear that the act done was by the consent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the person insured.

Cowp. 154.

These principles being advanced, it will now be sufficient to shew that they are supported and established by the cases

which

which have been decided. But before they are quoted, it will be proper to observe, that by the positive regulations of *Middleburgh*, *Amsterdam*, *Hamburgh*, and other countries in *Europe*, the underwriters are universally held to be answerable for losses arising by the barratry of the master or mariners. By the ordinances of *Rotterdam*, the owners of ships are prohibited from making insurances against the barratry of the masters, whom they themselves shall appoint; but they may insure against their neglect, and also against the villainy of the sailors, and of such masters as may happen to succeed to the command of the ship in foreign parts, without the knowledge of the owners, on account of the decease or absence of the master originally appointed. No such rule prevails in the law of *England*; but the insurer undertakes generally, and by express words inserted in the policy, to indemnify the owner of the ship or cargo against all losses which he may happen to sustain by the barratry of the master or mariners, even though the master should have been appointed by himself: a circumstance which is rather singular, for the insurer to undertake for the conduct of a man whom he can neither appoint nor dismiss.

2 Magens, 73. 130. 215.

2 Magens 89.

In an action upon the case on a policy of insurance, on the ship *Riga Merchant*, "at and from *Port Mahon* to *London*, "against the barratry of the master, (among other things,) "and all other damages, dangers, and misfortunes, which "should happen to the prejudice and damage of the said "ship," the breach assigned in the declaration was the loss of the ship, "*by the fraud and negligence*" of the master. The plaintiff had judgment in the Court of Common Pleas. The defendant brought a writ of error, and it was contended by his counsel, that the words "*fraud and negligence*," used in the declaration, were more general than the word *barratry*: and that the breach should have been express, that the ship was lost by the barratry of the master: that if the word barratry do import fraud, yet it does not import neglect; and the fact here alleged is, that the ship was lost by the fraud and negligence of the master. (*a*)

Knight v. Cambridge, 2 Ld. Raym. 1349. 1 Stra. 581.

But

(*a*) It now appears from manuscript notes of the following case of *Stamma* v. *Brown*, that the barratry committed in point of fact in *Knight* v. *Cambridge*,

But the Court were unanimously of opinion, that there was no occasion to aver the fact in the very words of the policy; but that if the fact alleged came within the meaning of the words in the policy, it would be sufficient. Barratry imports fraud: and he that commits a fraud may properly be said to be guilty of a neglect, *viz.* of his duty. Barratry of a master is not to be confined to the master's running away with the ship; but it extends to any fraud of the master. The end of insuring is to be safe in all events; and it would be very prejudicial if we were to make loop-holes to get out of these policies. The judgment was affirmed.

Stamma v. Brown, 2 Stra. 1173. In another case, the ship the *Gothic Lyon* being advertised to go to *Marseilles*, goods were shipped on board her, on behalf of the plaintiff; and a bill of lading was signed by the master, whereby he undertook to go straight to *Marseilles*, and the defendant underwrote a policy from *Falmouth* (where the goods were taken in) to *Marseilles*. Before the ship departed from the port of *London*, another advertisement was published for goods to *Genoa*, *Leghorn*, and *Naples*; and the plaintiff's agent was told, that it was intended to go to those ports first, and then come back to *Marseilles*; but he insisted that his bargain was to go directly to *Marseilles*; and he would not consent to let her pass by *Marseilles*, or alter his insurance.

The ship, however, did pass by *Marseilles*; and after delivering her cargo at the other ports, set out on her return for *Marseilles* with the plaintiff's goods; but in a voyage thither, was blown up in an engagement with a *Spanish* ship. In an action upon the policy, the breach assigned was a loss by the barratry of the master.

Lord Chief Justice *Lee* told the jury, that this voyage, being against the express agreement to go first to *Marseilles*, seemed to be more than a common deviation, as it was a formed design to deceive the contractor. He compared it

---

bridge, was "a sailing out of port without paying the port duties, whereby "the goods were forfeited and lost." See *Earle* v. *Rowcroft*, 8 *East's R.* 126. *Post.*

to

to the case of sailing out of port without paying the duties, whereby the ship was subjected to forfeiture, and which has been held to be barratry.

The jury staid out some time, and upon their return, asked the Chief Justice, "Whether, if the master were to have no benefit to himself by passing by *Marseilles*, and went only to the other places first for the benefit of his owners, that would be barratry? and the Chief Justice having answered "No," they found for the defendant.

A new trial being moved for, the case was argued; and all the Judges of the King's Bench were of opinion that the verdict was right: for the master has acted consistently with his duty to his owners; and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refused to ship them, or have altered the insurance. The Court also held, that to constitute barratry (*a*), there must be something of a criminal nature as well as a breach of contract; and that as the breach was assigned upon the barratry only, it was not supported by the evidence. So the defendant had judgment.

In Sir *John Strange*'s Reports we find another case upon the subject of barratry. The ship *Mediterranean* went to sea in the merchant's service, having also a letter of marque; and was insured by the defendant, being bound from *Bristol* to *Newfoundland*. In her voyage she took a prize, returned with it to *Bristol*, and received back a proportionable part of the premium. Another policy was then made, and the ship set out, the captain having first received express orders from the owners, that if he took another prize, he should put some hands on board such prize, and send her to *Bristol*; but that the ship in question should proceed with the merchant's goods. Another prize was taken in the due course of the voyage; and the captain gave orders to some of the crew to carry the prize

lton v. Brogden, 2 Stra. 1264.

(*a*) In *Phyn* v. *The Royal Exchange Company*, 7 *Term R.* 505. *post.* p. 147. and also in *Earle* v. *Rowcroft*, 8 *East's R.* 126. it appeared from a manuscript report of the case of *Stamma* v. *Brown*, read by Mr. Justice *Lawrence*, that Lord Chief Justice *Lee*, in defining barratry, said, "it "must be some breach of trust in the master *ex maleficio*."

to

to *Bristol*, and designed to go on to *Newfoundland*: but the crew opposed him, and insisted that he should go back, though he acquainted them with his orders: upon which he was forced to submit, and, on his return, his own ship was captured, but the prize got in safe.

In an action against the insurers, it was insisted, that this was such a deviation as discharged them. But Lord Chief Justice *Lee* and the jury held, that this deviation was excused by the force upon the master, which he could not resist, and therefore fell within the plea of necessity, which had always been allowed. The plaintiff's counsel thought it was barratry: but the Chief Justice was of opinion, that it did not amount to that, as the ship was not run away with, in order to defraud the owners. But as this was a case not of wilful deviation, but of a deviation through necessity, the insurers were held to be answerable, and the plaintiff had a verdict for the sum insured. (*a*)

(*a*) In an appeal from the *East Indies*, heard before the Lords of the Privy Council at the Cockpit, Sir *R. P. Arden*, the Master of the Rolls, in observing upon the above case of *Elton* v. *Brogden*, said, he thought it must be ill reported in *Strange*; for, upon the facts stated, there could be no doubt, but that the *mariners* had committed barratry; and he was therefore inclined to think, as Lord *Mansfield* appeared to have done in commenting upon this case in that of *Vallejo* v. *Wheeler*, that the policy must have been special, probably not including barratry of the mariners. *De Frise* v. *Stephens*, 1st *July* 1800. But with deference to such high authority, that could hardly have been the case; for otherwise the plaintiff's counsel acted most absurdly, in arguing that this conduct was barratrous, as from the above report they appear to have done, if barratry was a risk specially excluded from the policy. I have been at some pains to get at the record: but after a personal and diligent search, there does not appear to have been any judgment docketed; and, therefore, as I could not obtain the number of the judgment roll, a search amongst the records themselves would have been almost fruitless. Certainly, however, the ground upon which the decision in *Elton* v. *Brogden* turned, may well be doubted; as the conduct of the mariners seems to have been clearly barratrous: but the decision itself was correct; because a deviation, if occasioned by barratry, does not affect the claim of the assured to recover; but on the contrary charges the underwriters. See observations upon this case by Lord Chief Justice (Sir *James*) *Mansfield*, in pronouncing judgment in the cause of *Scott* v. *Thompson*, 1 *New Rep*. p. 181., where His Lordship seems to think the conduct of the sailors not barratrous.

These

These are all the common law cases, which are to be found on the subject of barratry during a long series of years, *viz.* from the first origin of insurances, till the year 1774, when a case arose, in which all the doctrine on this head was fully considered.

It was an action on a policy of insurance upon goods on board the *Thomas* and *Matthew* from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, *&c.* The loss was assigned different ways in the declaration: First, by storms and perils of the sea, in consequence of which, the ship was obliged to go to *Dartmouth* to be repaired; and, that afterwards, a further loss happened by storms, *&c.* Secondly, that it happened by storms and perils of the seas in the voyage generally; and Thirdly, by the *barratry* of the master.

Vallejo and another v. Wheeler, Cowp. Rep. 143.

The cause was tried before Mr. Justice *Ashhurst* at *Guildhall*, at the sittings after *Easter* term 1774, by a special jury. On the trial it was proved, that this ship was put up as a general ship from *London* to *Seville*; and was let to freight to one *Darwin*, to whom she was chartered by *Brown* the captain: that it is the course of vessels going on this voyage, to stop at some port in the west of *Cornwall*, to take in provisions: that this ship, having taken her cargo on board, sailed from *London* to the *Downs*: that while she lay there, all the other ships bound to the westward bore away; but she staid till the night after, and then sailed to *Guernsey*, which was *out of the course of the voyage*: that the captain went there for his own convenience, to take in brandy and wine on his *own account*: after which he intended to proceed to *Cornwall*: that the night after the ship quitted *Guernsey* she sprung a leak, which obliged her to put into *Dartmouth*. When she was refitted, she set sail again and proceeded for *Helford* in *Cornwall*, where it was always intended she should stop to take in provisions; but in her way she received further damage, and on her arrival there was totally incapable of proceeding on the voyage, and the goods were much damaged. It was attempted on the part of the defendant to prove, that one *Willes* was the owner of the ship: that the voyage to *Guernsey* was on his account, and that the goods taken on

board

board there were his property: but this evidence went little further than information and belief, except that it was proved, that when the ship arrived at *Helford*, the wine was delivered to him in his cellar. The learned Judge directed the jury, that if the going to *Guernsey* was *without the knowledge of Darwin*, it was barratry, and they ought to find for the plaintiff; but, if done with his knowledge, then it was no barratry: that if they should be of opinion, that it was without the knowledge of *Darwin*, he desired them to say, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and said, they thought the going to *Guernsey* was without the knowledge of *Darwin*, whom they looked upon to be the true owner; but they were of opinion, it was with the knowledge of *Willes*.

A motion was afterwards made for a new trial, and the case, being a question of great consequence to the mercantile world, was twice argued at the bar; after which the Judges were unanimously of opinion, that the plaintiff was entitled to recover, but they delivered the reasons of their judgment *seriatim*.

Lord *Mansfield*.—" The ground of the motion for a new trial in this case is, that under the circumstances, as they were given in evidence to the jury, the carrying the ship to *Guernsey*, was merely a *deviation*, but not *barratry*. Much more stress was laid at the trial, than in either of the arguments, upon this fact; namely, that the deviation being with the knowledge of *Willes* the owner (though not owner *pro hâc vice*) of the ship, it could never be barratry; and therefore the jury were pressed to say, whether it was with the consent of *Willes* or not; and they said, " It was." To be sure nothing is so clear, as that if the owner of a ship insure, and bring an action on the policy, he can never set up as a crime a thing done by his own direction or consent. It was therefore a material fact to proceed upon, if *Willes* had had any thing to do in the case; but he had not. It appeared to me that the nature of barrarty had not been judicially considered, or defined in *England* with accuracy. In all mercantile transactions, the great object should be certainty; and therefore, it is

is of more consequence that the rule should be certain, than whether the rule is established one way or the other; because speculators in trade then know upon what ground to proceed." His Lordship then stated the three cases above quoted from *Strange*; and after giving a definition of the word barratry, he proceeded thus: " In this case, the underwriter has insured against all barratry of the master; and we are not now in a a case where the owner or freighter is privy to it; if we were, it is evident, that no man can complain of an act, to which he is himself a party. In this case, all relative to *Willes* may be laid out of it: he is originally the owner; but not the insurer here. *Darwin* was the freighter of the ship, and the goods that were on board were his: if any fraud be committed on the owner, it is committed on *Darwin*. The question then is, What is the ground of complaint against the master? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* trusts he will set out immediately, instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville*: that is a cheat and a fraud on *Darwin*, who thought he would set out directly; and whether the loss happened in the act of barratry, that is *during* the fraudulent voyage, or *after*, is immaterial, because the voyage is equally altered, even though there is no other iniquitous intent. But in the present case there is a great deal of reason to say, that the loss sustained was in consequence of the alteration of the voyage. The moment the ship was carried from its right course, it was barratry; and here the loss happened immediately upon the alteration. Suppose the ship had been lost *afterwards*, what would have been the case of the insured if he were not secured against the barratry of the master? He would have lost his insurance by the fraud of the master; for it was clearly a deviation, andthe insured cannot come upon the underwriters for a loss, in consequence of a deviation. Therefore, I am clearly of opinion, that this smuggling voyage was barratry in the master."

Mr. Justice *Aston*. — " I wonder that there should remain a doubt at this day, what is meant by barratry in the master. In different ordinances different terms are used; but they all have the same meaning. In one of the ordinances of *Stockholm*, it is called " knavery of the master or mariners;" and the

the facts stated here, clearly fall within that description. Where it is a deviation with the consent of the *owner of the vessel*, and the master is not acting for his own private interest; in such case it is nothing but a deviation with the consent of the owner, and the underwriter is excused. In this case the hull of the ship belonged to *Willes*; but he had nothing to do with it, having chartered it to *Darwin*: the jury therefore did right in considering *Darwin* the owner *pro hâc vice*. Having considered him in that light, the conduct of the master was clearly barratry; for he was acting for his own benefit, without intending any good to his owner, and without his consent and privity. Nobody knows when the first commencement of the injury happened; but most probably, on the return of the ship to *Dartmouth* from *Guernsey*, where he had been for the purpose of smuggling. Therefore, I am clearly of opinion, that this change of the voyage for an iniquitous purpose, was barratry; which is not co nfinedto the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured."

Mr. Justice *Willes*. — "The only doubt I had in this case was, at what time the loss happened: and I think it may reasonably be said to have happened in consequence of the smuggling voyage: for if the ship had proceeded on her first intended course, she would have escaped the storm. Though this was a deviation, yet it is a fair and just rebutter to say, that it was barratry in the master, which is a peril insured against by the policy."

Mr. Justice *Ashhurst* continued of the same opinion, which he held at the trial; and the rule for a new trial was discharged by the unanimous opinion of the whole Court.

Robertson v. Ewer. Vide the last chapter. In another case, which has already been twice cited for another purpose, Mr. Justice *Buller*, who tried that cause, seemed to think, that the breach of an embargo was an act of barratry in the master.

Ross v. Hunter, 4 Term Rep. In a subsequent case, which was an action on a policy on goods on board the *Live Oak*, whereof *Joseph Rati* was master,

at

at and from *Jamaica* to *New Orleans*, it appeared that the ship was put up as a general ship at *Jamaica* in 1783; that she sailed on the voyage insured in *May* 1783, and arrived in *June* following, at the mouth of the river *Mississippi*, which leads up to *New Orleans* in *Spanish America*, at the distance of about thirty-five leagues. When the captain had got thus far he dropped anchor, and went in his boat up the river to *New Orleans*, and on his return without carrying the ship to her port of destination, stood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at *New Orleans*; but finding it difficult to do so, on account of a prohibition to import them into the *Spanish* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the master; and the whole Court of King's Bench, upon a motion for a new trial, were of opinion, that the facts stated amounted clearly to the crime of barratry.

33. See post. p. 154. for another point.

So also has been held by the Court of King's Bench, that if the captain of a ship, contrary to the instructions of his owner, cruize for and take a prize, and the vessel is afterwards lost in consequence of it, he is guilty of barratry, even though he libel his prize in the Court of Admiralty in the name of himself and his owner; and though the owner had procured a letter of marque, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruizing; for whatever is done by the captain to defeat or delay the performance of the voyage, is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his duty to them, it is barratry. In this case it also appeared, that the captain had boarded and plundered an American ship, which they afterwards released, before he cruized for and took the prize in question.

Moss v. Byrom, 6 Term Rep. 379. See post.

Two cases have arisen in which the doctrine of barratry was much considered: in the first of them the Court of King's Bench, after considerable argument, were

Phyn v. The Royal Exch. 7 Term Rep. 505.

 unani-

unanimously of opinion, that there must be fraud to constitute barratry, and that the jury, by negativing fraud, had in truth, by that finding, negatived barratry.

But in the second of those cases, the definitions of barratry, and the ingredients necessary to constitute that offence, were very elaborately argued at the bar: and after time taken for deliberation, Lord *Ellenborough* pronounced the unanimous judgment of the Court, in a very learned and luminous argument, in which His Lordship entered into a full consideration of all the prior cases, marked their relative distinctions, laid down the true definition of the offence, and guarded the hearer from imagining that the supposed generality of his doctrine could extend to cases, which evidently could not fall within the scope of his reasoning. I lament that I have not space to give this judgment verbatim: but the substance shall be detailed for the general reader, and professional men must be referred to the larger printed account in Mr. *East*'s Reports.

Earle and others v. Rowcroft, 8 East's Rep. 126.

It was an action on a policy of insurance, at and from *Liverpool*, to the coast of *Africa*, during her stay and trade there, and to the port of sale in the *West Indies*, and the plaintiffs averred the loss to be *by barratry of the master*. It appeared in evidence that the master, who was also supercargo, on his arrival off *Cape Coast Castle*, a British settlement on the coast of *Africa*, let go an anchor and began to trade for two days there; but receiving intelligence that he could barter his goods for slaves more expeditiously and advantageously at *D'Elmina*, a *Dutch* fort, about seven miles to windward, he weighed anchor and proceeded to this latter place, which had the *Dutch* flag flying and guns mounted, where he exchanged his goods, consisting, amongst other things, of muskets and gunpowder, with the *Dutch* governor, and another resident there for slaves. *Holland* was at that time at war with *Great Britain*, and he had a letter of marque on board against the *French* and *Dutch*. After taking on board a number of slaves, the captain who was then on shore at *D'Elmina*, receiving information that an *English* frigate was in sight, sent a note on board to his own ship, directing her to sail immediately to *Cape Coast*, *to prevent mischief*, as he expressed himself; but before she reached *Cape Coast* she

was

was pursued and captured by the *English* frigate, and condemned for having traded with the enemy. It further appeared, that it had been usual to keep up a trading intercourse in boats and small craft, between the *English* and *Dutch* settlements on this coast, even in time of war between the mother countries; and that the captain's object in going to *D'Elmina* was to complete his cargo as cheaply and expeditiously as he could. It was admitted that he had no particular instructions to go there, but that he was directed generally to make the best purchases with dispatch. It was also proved that when the ship was about to go to *D'Elmina*, the surgeon asked the captain, if there was no impropriety in going there, to which he answered that they should be soon gone, and nobody would know it; and also that besides his usual pay as captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage. Lord *Ellenborough* at the trial was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry: but as the case was new in specie, His Lordship gave the defendant leave to move to enter a non-suit. A motion having accordingly been made for that purpose, it was insisted by the counsel for the defendant, that the act done must be a breach of trust, and done *ex maleficio*; and that here the obvious motive of the act was to make the speediest and cheapest purchases for his employers. After the argument, the Chief Justice said, the Court would look into the cases; but added, "I cannot refrain from making a few observations now. It has been asked, How is this act of the captain, in going to *D'Elmina*, in order to purchase the cargo for his owners more cheaply and more expeditiously, a breach of trust, as between him and them? Now I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners, where they give any; and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage; because in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore the master of a vessel, who does an act in

 contra-

contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot therefore for a moment suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who, in contravention of the law, (the observance of which, nothing being expressed to the contrary, is implied in their orders,) does an act which is injurious to them." In a few days afterwards

Lord *Ellenborough* delivered the judgment of the Court. "The question in this case is, whether a loss, of a ship insured, by an illegal act of the master, not authorized by his owners, in going into *D'Elmina*, a *Dutch* and enemy's port on the coast of *Africa*, and trading there for slaves by a barter of arms and warlike stores, on account of which illegal traffic, the vessel insured was seized by a king's ship, and afterwards condemned on that account in the *West Indies*, be barratry: or whether, as was contended on the part of the defendant, in order to constitute barratry, the act should not appear to have been done with a view of promoting the master's benefit to the prejudice of his owners?" His Lordship then proceeded to state the meaning of the word in foreign languages, and to quote and comment upon the various cases in our law books, in which the extent of the term barratry had necessarily been considered: His Lordship then went on thus: "After these various decisions of courts of law, we are certainly warranted in pronouncing *that a fraudulent breach of duty by the master, in respect to his owners*; *or*, in other words, *a breach of duty, in respect to his owners, with a criminal intent*, *or* ex maleficio, *is barratry*. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws, which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended on the part of the defendant, that if the conduct of the master, although criminal in respect of the state, were in his opinion likely to advance his owner's interest and intended by him to do so, it will not be barratry; but to this we cannot assent. For it is not for him to judge in cases not

entrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, and not only from what ought to be, and must therefore be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. In laying down this doctrine, we feel ourselves supported by the several eminent authorities already referred to. And in giving this opinion, we do not feel any apprehension that simple deviations will be turned into barratry, to the prejudice of the underwriters; for unless they be accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry, as above laid down. Another argument was used, which hardly appears to have been used seriously; namely, that the captain, in this case, united in himself the two characters of supercargo and captain; and that as captain he must be considered as obeying the directions of his owners, given *to* himself as captain, *by* himself, in his character of supercargo. It is sufficient to state such an argument to shew it can have no weight. The directions of the owners as to the conduct of the voyage, and as to the places where the trade was to be carried on, are to be looked for in their instructions; which, coupled with their duty to their country, must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where trade might be carried on without violating the laws of their country." The plaintiffs therefore retained their verdict.

The Court, therefore, in the last case, cannot be considered as laying down any new rule; but only luminously explaining and expounding the rule, as collected from all the former decisions: for Lord *Ellenborough* most pointedly declares, that in laying down the doctrine he has done, the Court feel themselves supported by the several eminent authorities referred to; and the broad principle is this: *that a breach of duty by the master in respect to his owners, with a fraudulent or criminal intent, or* ex maleficio, *is barratry.* His Lordship is at the same time anxious to declare, that simple deviations from the

course of the voyage, unless accompanied with fraud or crime on the part of the master, will not constitute barratry.

Goldsmidt v. Whitmore, 3 Taunt. 508. A sentence condemning as enemy's property a cargo which the master had barratrously carried into the enemy's blockaded port, though it may prove it to be then enemy's property, does not disprove the allegation that the cargo was lost by the captain's barratrous act.

It has been a question, who are meant by the owners in the definition of barratry; but in the case of *Vallejo* v. *Wheeler*, it was settled, that the freighter of the ship is to be considered as the owner of it for the particular voyage: and it seems also clearly settled by the same case, that if an act be committed *with* the consent of the owners of the ship, that cannot be barratry. It was, however, in a later case, insisted upon at the bar, that an act of the captain, without the consent of the owners of the goods, who were the insured, *though with the consent of the owners of the ship*, was barratry, so as to charge the underwriters. But this argument was overruled by the Court; and could not have been admitted without overturning all former decisions upon the subject. Barratry implies something contrary to the duty of master, and mariners, *in the relation in which they stand to the owners of the ship;* and although they may make themselves liable to the owners of the goods for misconduct, yet not for *barratry*, which can be committed against the owners of the ship, and them only.

Nutt and others, assignees of Hague v. Bourdieu, 1 Term Rep. 323. The case in which this point was settled, was an action on a policy of insurance, made by *Hague* before he became a bankrupt, *on goods* laden in the ship *Rachelle* (otherwise the *Bellona*) for a voyage from *London* to *Rochelle*, subscribed by the defendant for 120*l.* at 1*l.* 10*s.* *per cent.* premium. The cause was tried at *Guildhall* before Mr. Justice *Buller*, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: That the bankrupt shipped on board the vessel in question goods to the amount of 1,800*l.* for *Rochelle*. That the captain, *by the instigation and direction of Messrs. Le Grands, the owners of the ship, went with the ship and cargo to Bourdeaux instead of Rochelle*, where the

the cargo was sold by the agent of *Le Grands*. That a petition was presented by the plaintiffs to the lieutenant-general of the admiralty of *Guienne*, stating the whole of the transaction between the bankrupt and the owners and captain; that in order to procure a landing at *Bourdeaux*, their original destination being to *Rochelle*, false bills of lading were made out by the captain, at the instigation of *Le Grand*: the petition concluded with a prayer for relief. In consequence of this petition, a decree was passed, declaring *René Guiné* (captain) *guilty of the crime of barratry of the master*, for having signed false bills of lading, *&c.* for reparation whereof, it sentenced him to perpetual service in the gallies. It also declared *Dominique Le Grand* guilty, and convicted *of having been an instigator and accomplice of the said barratry* of the master, and adjudged him to five years' servitude in the gallies: and also decreed, that the said *René Guiné* and *Le Grand* should pay to the plaintiffs the amount of their loss, and all charges and costs. The question on this case is, Whether the plaintiffs were entitled to recover against the insurers? After the first argument,

Lord *Mansfield* said, " that with regard to the sentence which had been passed abroad, and which had declared the master and owner to have been guilty of barratry, it was entirely out of the question. That though it was a most righteous judgment, yet that it was no part of the consideration of the Court there, what was meant by barratry in an *English* policy. The question was left entirely open. That their idea of barratry was manifestly different from the construction put upon that word in our own Courts, for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an *English* court of justice.

A few days afterwards the Court declared, that they had not the smallest doubt as to the present question, and therefore thought it very unnecessary to hear a second argument.

Lord *Mansfield* delivered the opinion of the Court.

All questions upon mercantile transactions, but more particularly

ticularly upon policies of insurance, are extremely important, and ought to be settled. The general question here is on the construction of the word *barratry* in a policy of insurance. It is somewhat extraordinary that it should have crept into insurances, and still more, that it should have continued in them so long; for the underwriter insures the conduct of the captain, whom he does not appoint, and cannot dismiss, to the owner, who can do either. The point to be considered is, Whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owners of the ship? It is clear, beyond contradiction, that it cannot; for barratry is something contrary to the duty of the *master and mariners*, the very terms of which imply, that it must be in the relation in which they stand to the *owners of the ship*. The words used are *master* and *mariners*, which are very particular. *An owner cannot commit barratry*. He may make himself liable by his *fraudulent conduct* to the owner of the goods, but not *as for barratry*. And, besides, barratry cannot be committed against the owner *with his consent*; for though the owner may become liable for a civil loss by the misbehaviour of the captain, if he consents, yet that is not *barratry*. Barratry must partake of something criminal, and must be committed *against the owner* by the *master* or *mariners*. In the case of *Vallejo* and *Wheeler*, the Court took it for granted, that barratry could only be committed against the owner of the ship. The point is too clear to require any further discussion.

The *postea* was delivered to the defendant.

It is clear, that if the owner be also the master of the ship, any act, which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against one of the rules laid down in a former part of this chapter; namely, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurer for a loss occasioned by his own act. But where the person, who acts as master of the ship, is proved to have carried her out of her course for fraudulent purposes of his own, that is *prirâ facie* evidence of barratry, so as to entitle the assured to recover against the underwriter,

Ross v. Hunter, 4 Term Rep. 33. See ante p. [illegible]7.

without requiring him to prove *negatively* that such captain was not the owner, or shewing who really was so. The fact of his being owner must be established by the underwriter, in discharge of whom it is to operate.

This rule respecting the same person being both owner and master has been extended in the Court of Chancery to a case, where such an owner and master, after mortgaging his ship, had committed barratry; and when the mortgagee brought an action at law against the insurer to recover damages for the loss which he had sustained by this act of barratry, the Court still considering the mortgagor as the owner, granted an injunction.

The facts of that case were these. The plaintiff in equity, having been sued at law upon a policy of insurance against the barratry of the master, which was also the loss assigned in the declaration, brought his bill in Chancery to be relieved, and for an injunction. The voyage insured was from *London* to *Marseilles*, and from thence to some port in *Holland*. The master sailed with the ship to *Marseilles*, and then, instead of pursuing his voyage, sailed to the *West Indies*, where he sold his ship, and died insolvent. The plaintiff by his bill suggested, that *Matthews*, the master, was also the owner of the ship: that he had, before the voyage, entered into a bottomry bond to the defendant for 200*l.*, and afterwards, by a bill of sale, had assigned over his interest in the ship to the defendant, as a security for the 200*l.*: that *Matthews* was nevertheless, in equity, to be considered as owner of the ship, though in law the ownership and property would be looked upon to be in the defendant; and that the owner of a ship could not, either in law or equity, be guilty of a barratry concerning the ship; and therefore he prayed an injunction, and that the policy might be delivered up. The matters of fact being confessed by the answer, an injunction was moved for on the principle, that a mortgagor is to be considered in equity as the owner of the thing mortgaged; and that *Matthews*, the master, being owner, could not be guilty of barratry.

Lewin v. Suasso, Chancery, 16 Geo. 2. Postlethw. Dictionary, 1 vol. 147.

Lord *Hardwicke*. — "Barratry is an act of wrong done by the

the master against the ship and goods; and this being the case of a ship, the question will be, Who is to be considered as the owner? Several cases might be put where barratry may be assigned as the breach of an insurance; and barratry or not is a question properly determinable at law: but in this case it is not so, for courts of law will not consider a mortgagor as having any right or interest in the thing mortgaged; and a man may frequently come into equity for relief in respect of a part only of his case. It might, indeed, be considered at law, whether what the master has done, whether he be owner or not, did not amount to a breach of contract as master, and so to a barratry: it may likewise be so considered in this Court. But at law a defendant cannot read part of a plaintiff's answer to a bill filed against him here: the whole answer must be read, which has often been a reason for this Court to interpose by injunction upon a plaint at law; and considering the mixed nature of this case, I think an injunction ought to be granted."

Havelock v. Hancil upon demurrer, 3 Term Rep. 277.

Even if the parties insert in the policy that the insurance shall be upon the ship *in any lawful trade*, if the captain commit barratry by smuggling, the underwriters are answerable. For otherwise the word *barratry* should be struck out of the policy; and most clearly the stipulation in the policy respecting the employment of the ship in a lawful trade, must mean, as was said by Lord *Kenyon* in delivering the unanimous opinion of the Court, *the trade on which she is sent by the owners.*

Toulmin v. Anderson, 1 Taunt. 227. Hucks v. Thornton, 1 Holt, 38. Archangelo v. Thompson, 2 Camp. 620.

A loss by barratry is well alleged, though it be proved to have happened by the joint act of an enemy, aided by some of the crew. Indeed, it should seem, it would be good also if laid the other way; at least Lord *Ellenborough* allowed a plaintiff under similar circumstances to recover, where the loss was laid to have been *by capture.*

Hitherto we have considered barratry, only as it affects the rights of the insurer and insured, which is certainly the material point of view in our present enquiry: but before we come to the conclusion of this chapter, it will be proper to take notice of those positive regulations, which exist in this

and

and other countries, for the punishment of those who are guilty of some of the more heinous acts of barratry.

By the ordinances of *Middleburg*, *Rotterdam*, and *Hamburgh*, if any act of barratry be committed by the master, various degrees of punishment, sometimes amounting even to death, are inflicted upon him, proportioned to the enormity of his guilt. 2 Mag. 77. 112. 215.

We do not find that any punishment was expressly provided, by the law of *England*, for offences of this nature, till the reign of Queen *Anne*, at which time, as may be collected from the preamble of the statute, the wilful casting away, burning or destroying of ships by the master or mariners, was become very frequent.

To prevent these evils that statute ordains, "that if any "captain, master, mariner, or other officer belonging to any "ship shall wilfully cast away, burn, or otherwise destroy "the ship unto which he belongeth, or procure the same to "be done, to the prejudice of the owner or owners thereof, "or of any merchant or merchants that shall load goods "thereon, he shall suffer death as a felon." 1 Anne, stat. 2. c. 9 s. 4.

Upon trial this act was found not to be sufficiently extensive, and therefore, by a subsequent statute, it was declared, "that if any owner of, or captain, master, mariner, or other "officer belonging to any ship, shall wilfully cast away, burn, "or otherwise destroy the ship of which he is owner, or unto "which he belongeth, or in any manner direct or procure "the same to be done, to the prejudice of any person or per-"sons that shall underwrite any policy or policies of insu-"rance thereon, or of any merchant or merchants that shall "load goods thereon, he shall suffer death." 4 Geo. 1. c. 12. s. 3.

By a subsequent statute it was afterwards enacted, "that if "any owner of, or captain, master, officer, or mariner be-"longing to any ship or vessel, shall wilfully cast away, burn, "or otherwise destroy the ship or vessel of which he is "owner, or to which he belongeth; or in any wise direct or "procure the same to be done, with intent or design to pre- 11 Geo. 1. c. 29. s. 6.

"judice

"judice any person or persons that hath underwrote, or shall "underwrite any policy or policies of insurance thereon, or "of any merchant or merchants that shall load goods thereon; or of any owner or owners of such ship or vessel, the "person or persons offending therein being thereof lawfully "convicted, shall be deemed and adjudged a felon or felons, "and shall suffer, as in cases of felony, without benefit of "clergy."

7th section. The following section directs, that if the offence be committed within the body of a county, the same shall be tried as all felonies are in the common law courts: but if upon the high seas, then to be tried agreeably to the directions of the 28 H. 8. c. 15.

These are the only positive regulations, known to the law of *England*, for the punishment of those who wilfully destroy ships to the prejudice of such persons as are interested in their preservation.

CHAPTER VI.

Of Partial Losses, and of Adjustment.

HAVING, in the preceding chapters, treated fully of the different kinds of losses, for which the underwriters are answerable, the subject naturally leads one to consider, when losses shall be said to be total, and when partial or *average*, as they have been most commonly denominated. When we speak of a total loss, we do not always mean to signify, that the property insured is irrecoverably lost or gone: but that, by some of the perils mentioned in the policy, it is in such a condition, as to be of little use or value to the insured, and so much injured, as to justify him in abandoning to the insurer, and in calling upon him to pay the whole amount of his insurance, as if a total loss had actually happened. But the idea of a total loss, in this sense of the word, is so intimately blended and interwoven with the doctrine of abandonment, that it will add much to clearness and precision, to refer what may be said on this subject, till we come to the chapter on abandonment. In this place it will be sufficient to remark, that in case of a total loss, properly so called, the prime cost of the property insured, or the value mentioned in the policy, must be paid by the underwriter; at least, as far as his proportion of the insurance extends. This is evident from the nature of the contract: for the insurer engages as far as to the amount of the prime cost, or value in the policy, that the thing insured shall come safe: he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the sale of the goods. If they be totally lost, he must pay the prime cost, that is, the value of the thing he insured, at the *outset:* he has no concern in any subsequent value. So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost: as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those

2 Burr. 1170.

those ten hogsheads, without any regard to the price, for which the other ninety may be sold. Thus much at present for total losses.

The subject of this and the following chapter, seems to be of all others the most intricate and perplexing, in the whole law of insurance; an intricacy, which arises from several causes. In the first place, the subject of average has very seldom fallen under the cognizance of courts of judicature in this country; consequently there are very few adjudged cases to be found. In this scarcity of settled principles, recourse must be had to the writers of foreign nations, and to such of our own as have written upon commerce in general: but the research is by no means attended with satisfaction, much less with conviction.
3 Burr. 1555. Another source of perplexity upon this subject is, the irregularity and confusion, which we meet with, in the present form of policies of insurance. Ambiguities frequently arise in them, by using the same words in different senses; and, in no instance, is this absurdity more glaring than in the use of the word average. This word in *policies* has two significations; for it means, "*a contribution to a general loss:*" and it also is used to signify "*a particular partial loss.*" In commercial affairs, indeed, it has no less than four different meanings: and therefore it cannot be wondered at, if much confusion of ideas has arisen upon the subject. In order to prevent that, if possible, in the subsequent part of this work, I shall here endeavour to distinguish between the four different senses of the word "average;" and wherever I shall have occasion in future to speak of a damage arising to goods or other property, not total, except when I am reciting the words of a policy, I shall take the liberty of calling it, as I have already done at the head of this chapter, a *partial*, not an *average* loss.

Lex Merc. red. 147. When goods or merchandizes carried by sea, are thrown overboard in a storm, for the purpose of lightening the ship; the owners of the ship and of the goods saved contribute for the relief of those, whose goods are ejected, in such a manner, that all, who profited by the lightening of the ship, may bear a proportional loss of the goods, thus thrown overboard, for the common safety. This contribution is what is called general

neral or gross average; the full discussion of which will be the business of the next chapter.

Small or petty averages are the next species, and, as these never fall upon the underwriters, I shall here set down all that is necessary upon this subject. Petty average consists in such charges and disbursements, as according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage. These charges are, lodemanage, which, as it appears by *Cowel's* interpreter, means the hire of a pilot for conducting a vessel from one place to another; towage, pilotage, light-money, beaconage, anchorage,* bridge-toll, quarantine, river-charges, signals, instructions, passage money by castles, expences for digging a ship out of the ice, when frozen up, that it may be brought into a proper harbour; and at *London*, by custom, the fee paid at *Dover* pier. These seem to be all the articles which come under the denomination of petty or accustomed average, as well in this as in foreign countries.

Magens, 72.

Cowell, 2 Mag. 189. 278.

For these charges, the insurers are never answerable; but one-third of the expences is borne by the ship, and two-thirds by the cargo. But in order to discharge the insurer, it must appear that the disbursements were usual and customary in the voyage; for if they were incurred for any extraordinary purpose, or in order to relieve the ship and cargo from some impending danger, they shall then be reputed a general average, and consequently be a charge on the insurer. In lieu of these petty averages, it has become usual at some places to pay 5 *per cent.* calculated on the freight, and 5 *per cent.* more for primage to the captain.

1 Mag. 72.

1 Mag. 72.

Another species of average, in matters of commerce, is that which we are accustomed to meet with in bills of lading, "paying so much freight for the said goods, with primage "and *average* accustomed." In this sense it signifies a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention to the goods so entrusted to him. This kind of average may also be laid out of the present en-

Jacob's Law Dict. title Average.

quiry, as it is too insignificant a charge to fall upon the underwriter.

Having thus disposed of the different kinds of average, so as to prevent a confusion of ideas, we shall now proceed to the main subject proposed, namely, what shall be considered as a partial loss? How such a loss shall be adjusted, and in what proportion it shall be paid? I said, at the beginning of this chapter, that these were questions of intricacy; and so most undoubtedly they formerly were; but much light has been thrown upon them by Lord *Mansfield*, in his elaborate and very learned argument in the case of *Lewis* v. *Rucker*; and, as that case has been frequently recognized, and has ever since been looked up to, as the rule and standard of decision upon similar occasions, I have drawn most of my ideas upon this subject from the reasoning there made use of by His Lordship in delivering the opinion of the Court.

2 Burr. 1167.

Partial loss, *ex vi termini*, implies a damage, which the ship may have sustained, in the course of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it also means the damage which goods may have received, without any fault of the master, by storm, capture, stranding, or shipwreck, although the whole, or the greater part thereof may arrive in port. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. For if the goods arrive, but lessened in value through damage received at sea, the nature of an indemnity speaks demonstrably, that it can only be effected by putting the merchant in the same condition in which he would have been, if the goods had arrived free from damage.

2 Burr. 1172.

The underwriters of *London* expressly declare, as appears from a memorandum at the foot of the policy, that they will not answer for partial losses, not amounting to 3 *per cent.* This clause was introduced into *English* policies about the year 1749, having long before that time been generally used in almost all the trading countries in *Europe*; and it was intended to prevent the underwriters from being continually harassed by trifling demands. But at the same time, that they provide

Vide the Appendix, No. 1.

provide against trifling claims for partial losses, they undertake to indemnify against losses, however inconsiderable, that arise from a general average; because that can never happen but in cases of imminent danger, when it is for the common interest that such expences should be incurred.

It has been observed by a very sensible merchant, who has written upon insurances, that almost all the ordinances seem deficient, in not fully explaining in what cases, and in what manner, the damage arising from a partial loss, shall be deemed to exceed 3 *per cent.* To illustrate his meaning, he states this case. Suppose, says he, a merchant has shipped 101 chests of goods, of which, on arrival, three chests are, by the sea, or by some accident, so spoiled, as to be worth nothing; if the damage be calculated as on the whole value of 101 chests, it will not exceed 3 *per cent.* and it is thought by most insurers not to be recoverable, in such a case, by the insured: especially if the insurance be made, without expressly declaring, in the policy, the particular sum insured on each chest. The foundation of this opinion is, that it is considered as one entire insurance, and not a distinct insurance on each chest. 1 Mag. 73.

This is a point, which at first view may seem to fall within a case laid down by Lord *Mansfield*. "If," said His Lordship, "the cargo be totally lost, the underwriter must pay the value of the thing he insured. So, if part of the cargo, capable of a several and distinct valuation at the outset be *totally* lost: as if there be 100 hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other 90 may be sold." So it has been supposed in the case put by *Magens*, the three chests of goods are as capable of a distinct and several valuation, as the three hogsheads of sugar: and consequently are to be paid for, as for a total loss. But Lord *Mansfield* is putting a case merely to shew, that the market price is not at all to be considered in charging the insurer; and His Lordship certainly had not in his contemplation the case put by *Magens*. 2 Burr. 1170.

If several articles be insured for one sum, with a distinct valuation on each, as upon ship so much, on cargo so much, and no part of the cargo be taken on board, so that the risk on that never attaches: and if the ship be lost the insured shall recover such a portion of the sum insured, as the value of the article lost bore to the value of the whole. This doctrine is illustrated by the case of an insurance on the ship *Dart*, from *St. Kitt*'s to *London*, on which the defendant had underwritten 200*l*. The plaintiff had written from *St. Kitt*'s to his agent in *London* to effect a policy on ship and cargo, to the amount of 5500*l*., calculating the ship at 1500*l*. of that sum. No goods were ever loaded on board. Lord *Kenyon*, though he at first doubted, afterwards adopted the rule which the special jury assured him was established at *Lloyd*'s coffee-house for settling losses of this kind, namely, that as the policy on the cargo never attached, the assured was only entitled to recover such a proportion of the sum, which the defendant had underwritten, as the property on which the policy attached bore to the whole.

Amery v. Rodgers, 1 Esp. R. 207.

As clearness and precision are necessary upon all subjects, and more especially upon this, it will be proper to observe, that when we speak of the underwriter being liable to pay, whether for total or partial losses, it must always be understood, that they are liable only in proportion to the sums which they have underwritten. Thus, if a man underwrite 100*l*. upon property valued at 500*l*. and a total loss happen, he shall be answerable for 100*l*. and no more, that being the amount of his subscription: if only a partial loss, amounting to 60*l*. or 70*l*. *per cent*. upon the whole value; he shall pay 60*l*. or 70*l*. being his proportion of the loss.

1 Mag. 35. When a total loss happens, the insured is entitled to recover against the underwriter, as soon as he has proved the value of the thing insured: but when the value is inserted in a policy, the insurer, by allowing such insertion, has admitted the value to be as stated; and nothing remains but to prove, that the goods insured were actually on board the ship. It is only in cases of total loss that any difference exists between a valued, and an open policy; in the former case the value is ascertained; in the latter, it must be proved. But where

Vide ante, c. 1. p. 1.

 the

the loss is partial, the value in the policy can be no guide to ascertain the damage: which then necessarily becomes a subject of proof, as much as in the case of an open policy.

When a partial loss happens, the first enquiry which naturally arises is this; for what does the insurer undertake to indemnify the owner, in case of a partial loss? To answer this question, regard must be had to the nature of the contract between the underwriter and the merchant. What is the nature of the contract? That the goods shall come safe to the port of delivery; or if they do not, that the insurer will indemnify the owner to the amount of the value of the goods stated in the policy. Wherever then the property insured is lessened in value, by damage received at sea, justice is done by putting the merchant in the same condition (relation being had to the prime cost or value in the policy,) which he would have been, if the goods had arrived free from damage; that is, by paying him such proportion of the prime cost or value in the policy as corresponds with the proportion of the diminution in value occasioned by the damage. The question then is, how is the proportion of damage to be ascertained? It certainly cannot be by any measure taken from the prime cost: but it may be done in this way. Where an entire thing, as one hogshead of sugar, happens to be spoiled, if you can fix, whether it be a third, a fourth, or a fifth worse, then the damage is ascertained to a mathematical certainty. How is this to be found out? Not by any price at the port of discharge, but it must be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case it equally shews, whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound; consequently whether the injury sustained be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost; so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth, not of the value for which it is sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges, and the premium of in-

2 Burr. 1172, 1173.

2 Burr. 1170.

1 Mag. 37. surance, shall be the foundation, upon which the loss shall be computed. (a)

This rule of ascertaining damage, occasioned by a partial loss, seems to be fraught with so much good sense, to be so very comprehensive, and so intelligible to every understand-

(a) This mode of estimating the value of property on a policy of insurance was very fully considered in a case before Lord Chief Justice *Lee*, as I find it in a manuscript volume of his decisions, which I have had the good fortune to procure since the five former editions of this work were published.

Tuite v. The Royal Exch. Ass. Comp. at Guildhall, after T. R. 1747.

Insurance on goods on board the ship *Biddy*, to be valued at and there was the usual clause for abating 2*l. per cent.* in case of loss. The sum subscribed by the company was 1500*l.* On the trial of an action, upon this policy, it was admitted that the ship was lost, whereby deducting the 2*l. per cent.* 1470*l.* was to be paid by the company, if the plaintiff made out his interest to that sum; and as to the plaintiff's interest it was admitted, that he had goods on board to the value of 1211*l.* and that the premium paid the company was 259*l.* 14*s.* 6*d.* which was reckoned upon the whole 1500*l.* after the rate of 17*l.* 6*s. per cent.* (*i. e.* 16*l.* 6*s. per cent.* premium, and 10*s. per cent.* commission,) and these two sums (*viz.* the value of the goods and the whole premium paid) amounted together to the sum of 1470*l.* 14*s.* 6*d.* which was 14*s.* 6*d.* more than the sum to be paid upon the policy. It was agreed on all sides that the plaintiff had a right to include in his interest the premium he paid on the value of his goods; but it was made a question by the defendant, whether he should include the whole premium of 259*l.* 14*s.* 6*d.* for it was said that he should not include a premium of a premium, as this was, there being first a premium on the value of the goods, and the remainder being a premium upon that premium. But it was agreed by the Chief Justice, and by several merchants, who were examined as witnesses, and by a special jury of merchants, to be the constant practice, that a person who insures his goods is intitled to include in his interest the premium not only upon the value of his goods, but also upon the sum insured: he intends to insure to his full interest, for otherwise he would not recover his whole interest, that is, he would not receive so much as his loss was, which in the present case was on goods 1211*l.* and premium paid 259*l.* 14*s.* 6*d.* (in all 1470*l.* 14*s.* 6*d.*) the money to be paid to him would fall short of that sum, if the premium upon the whole 1500*l.* was not to be reckoned.

And this case was put by the plaintiff's counsel, which bears an exact proportion to the sums in the present case.

Suppose a man has goods to the value of 80*l.* 14*s.* which he wants to insure. He pays the same premium as here, 17*l.* 6*s.* which makes his interest 98*l.* In order to secure this, it is necessary for him to insure 100*l.* then in case of loss abating 2*l. per cent.* he has his 98*l.* which is the true value of his interest. The plaintiff had a verdict.

ing,

ing, that it will now be only necessary to shew, that the decided cases have been agreeable to that rule: first requesting the reader to bear in mind, what has already been mentioned, namely, that the value, upon which the foregoing calculation rests, is the prime cost of the commodity, wholly independent of the rise or fall of the market, or the schemes or speculation of the merchant.

In an action upon a policy of insurance to recover an average loss upon goods, Mr. Justice *Buller* observed, that in such cases, whether the goods arrived to a good or bad market was immaterial; for the true way of estimating the loss was to take them at the fair invoice price. (*a*) Dick and another v. Allen, at Guildhall, after Mich. Term, 1785.

A rule having been obtained by the plaintiffs, who were the insured, for the defendant (the insurer) to shew cause, why a verdict, obtained by him, should not be set aside, and a new trial had; Lewis and another v. Rucker 2 Burr. 1167.

The Court, after hearing the matter fully debated, took time to advise, and their unanimous opinion was delivered to the following effect:

Lord *Mansfield*.—" This was an action brought upon a policy, by the plaintiffs, for Mr. *James Bourdieu*, upon the goods on board a ship called the *Vrow Martha*, at and from *St. Thomas's Island* to *Hamburgh*, from the loading at *St. Thomas's Island*, till the ship should arrive, and land the goods at *Hamburgh*. The goods, which consisted of sugars, coffee, and indigo, were valued; the clayed sugars at 30*l.* *per* hogshead; the *Muscovado* sugars at 20*l.* *per* hogshead; and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average, (that is, partial loss,) under 5*l.* *per cent.*; and all other goods free from average under 3*l.* *per cent.* unless general, or the ship be stranded.

(*a*) Neither does the underwriter insure against any loss that may arise from the difference of exchange. *Thellusson* v. *Bewick*, Sittings after *Michaelmas*, 34 *Geo.* 3. 1 *Espinasse*, p. 77.

In

In the course of the voyage the sea water got in; and when the ship arrived at *Hamburgh*, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained, made it necessary to sell them immediately; and they were accordingly sold; but the difference between the price which they brought, on account of the damage, and that which they might then have been sold for at *Hamburgh*, if they had been sound, was as 20*l.* 0*s.* 8*d.* *per* hogshead is to 23*l.* 7*s.* 8*d.* *per* hogshead; (that is, if sound, they would have been worth 23*l.* 7*s.* 8*d.* *per* hogshead; as damaged, they were only wort 20*l.* 0*s.* 8*d.* *per* hogshead.)

The defendant paid money into Court, by the following rule of estimating the damage: he paid the like proportion of the sum, at which the sugars were valued in the policy, as the price of the damaged sugars bore to sound sugars at *Hamburgh*, the port of delivery. All this was admitted at the trial; though perhaps upon an accurate computation, there may be a mistake of about 17*s.* on the money paid in. But no advantage was attempted to be taken of this slip: it was admitted, that the money paid in was sufficient, if the rule, by which the defendant estimated the loss, was right: and the only question was, By what measure or rule the damage, upon all the circumstances of the case, ought to be estimated?

To distinguish this case, under its particular circumstances, out of any general rule, the plaintiff's counsel called Mr. *Samuel Chollett*, clerk to Mr. *Bourdieu*, who proved, that upon the 15th of *February*, the time of the insurance, sugars were worth at *London* and *Hamburgh*, 35*l.* a hogshead; that the proposal of a congress to be holden, and the expectation of a peace, had, on a sudden, sunk the price of sugars: that before the ship arrived at *Hamburgh* and before he knew that the sugars had received any damage, Mr. *Bourdieu* had sent orders, that the sugars should be housed at *Hamburgh*, and kept till the price should rise above 30*l.* a hogshead: that he had many hundred hogsheads of sugar lying at *Amsterdam*, to which place he had sent the like orders: that the congress not taking place, *in fact* sugars rose 25 *per cent.*: that what he sold of the sugars, which he had at *Amsterdam*, brought

30*l.* *per*

30*l. per* hogshead, and upwards: that he might have sold these sugars at the same price, if they had been kept, according to his orders; and the only reason for which they were not kept was, because they were rendered perishable from the sea water, which had got in, Therefore, said they, the necessity of an immediate sale, and the consequence thereof, ought to be computed into the damage.

The special jury (among whom there were many sensible merchants) found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it than any body else present; and they formed their judgment from their own notions and experience, without much assistance from any thing that passed.

The counsel for the plaintiff, in the outset, chiefly rested upon the particular circumstances of this case. The defendant offered to call witnesses to prove the general usage of estimating the quantity of damage, when goods are injured.

I was at first struck with the argument, that the immediate necessity of selling in this case might be taken into consideration, as an exception to the general rule; and proposed that the cause might be left to the jury upon that point. But Mr. *Winn* for the defendant argued, that the necessity of selling, and the consequence thereof, ought not to be regarded: and what he said, had so much weight, that it very much changed my way of thinking.

There was nothing to sum up; but the jury asked, Whether I would give them any directions? I said, I left it to them, "Whether the difference between the sound and the damaged "sugars, at the port of delivery, ought to be the rule? or, "Whether the necessity of an immediate sale, certainly occasioned by the damage, and the loss thereby, should be "taken into consideration?" I told them, though it had struck me at first, this might be an exception; yet what the counsel for the defendant said to the contrary seemed to have great weight. The verdict was for the defendant; and a new trial was moved for.

No

No fact is now disputed; the only question is, Whether the jury have estimated the damage by a proper measure? To make this matter more intelligible, I will first state the rule by which the defendant and the jury have gone; and then I will examine whether the plaintiff has shewn a better.

The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price in money, which either the sound or the damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy to be 30*l.*; the goods are damaged, but sell for 40*l.*; if they had been sound, they would have sold for 50*l.* The difference then between the sound and damaged is a fifth; consequently the insurer must pay a fifth of the prime cost, or value in the policy, that is 6*l.*; *e converso*, if they come to a losing market, and sell for 10*l.* being damaged, but would have sold for 20*l.* if sound, the difference is one half: the insurer must pay half the prime cost, or value in the policy, that is 15*l.*

To this rule two objections have been made. First, that it is going by a different measure in the case of a partial, from that which governs in case of a total loss; for upon a total loss, the prime cost, or value in the policy, must be paid. The answer to which objection is, that the distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage, to the amount of the value in the policy; and therefore, if the thing be totally lost, the insurer must pay the whole value which he insured at the outset. But where a part of the commodity is spoiled, no measure can be taken from the prime cost to ascertain the quantity of the damage sustained. The only way is to fix, whether the thing be a third or fourth worse than the sound commodity; and then you pay a third or fourth of the prime cost, or value of the goods so damaged. (*a*)

(*a*) In Lord *Mansfield's* argument, in answer to the first objection, I have taken the liberty of abridging much of what fell from His Lordship, having already inserted it in the former part of the chapter, where I laid down the rules of decision upon this point.

The next objection, with which this case has been entangled, is taken from the circumstance of the policy in question being a valued policy.

I am a little at a loss to apply the arguments drawn from thence. It is said, "that a valued is a wager policy, like *in-* "*terest or no interest*; and if so, there can be no partial "loss, and the insured can only recover as for a total loss, "abandoning what is saved, because the value specified is "fictitious."

A valued policy is not to be considered as a wager policy, or like "*interest or no interest*." If it were, it would be void, by the statute of 19 *Geo.* 2. c. 37. The only effect of the valuation, is fixing the amount of the prime cost, just as if the parties admitted it at the trial: but in every argument, and for every other purpose, it must be taken, that the value was fixed in such a manner, as that the insured meant to have an indemnity only, and no more. If it be undervalued, the merchant himself stands the insurer for the rest. If it be much overvalued, it must be done with a bad view, either to gain, contrary to the 19th of *George* the Second, or with some view to a fraudulent loss, therefore, the insured never can be allowed to plead in a court of justice, that he has greatly overvalued, or that his interest was merely a trifle.

Vide post. c. 14.

It is settled that, upon valued policies, the merchant need only prove some interest to take them out of the 19th *Geo.* 2.; because the adverse party has admitted the value: and if more proofs were required, the agreed valuation would signify nothing. But if it should come out in proof, that a man had insured 2,000*l.* and had interest on board to the value of a cable only, there never has been, and, I believe, there never will be a determination, that, by such an evasion, the act of parliament may be defeated. There are many advantages from allowing valued policies: but where they are used merely as a cover to a wager, they would be considered as an evasion. To argue that there can be no adjustment of a partial loss upon a valued policy, is directly contrary to the very terms of the policy itself. It is expressly *subject to average*, if the loss upon sugars exceed 5 *per cent.*; and even if it were not

not subject to average, the consequence would be, that every partial loss must thereby become total; but only the event, to entitle the insured to recover, would not happen, unless there was a total loss. Consequently the plaintiff in this case would not be entitled to recover at all; for there is no colour to say that this was a total loss; besides, the plaintiffs have taken the goods and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of two grounds.

1st, Because the general rule of estimating should be the difference between the price the damaged goods sell for, and the prime cost or value in the policy. Here the damaged sold at 20*l.* 0*s.* 8*d.* *per* hogshead; and the underwriter should make it up 30*l.* To this I answer, that it is impossible that should be the rule: it would involve the underwriter in the rise or fall of the market: it would subject him, in some cases, to pay vastly more than the loss; in others, it would deprive the insured of any satisfaction, though there was a loss. For instance, suppose the prime cost or value in the policy 30*l.* *per* hogshead: the sugars are injured; the price of the best is 20*l.* a hogshead; the price of the damaged is 19*l.* 10*s.* The loss is about a fortieth, and the insurer would be to pay above a third. Suppose they come to a rising market, and the sound sugars sell for 40*l.* a hogshead, and the damaged for 35*l.* the loss is an eighth, yet the insurer would be to pay nothing.

Vide supra, Dick v. Allen, p. 167.

The 2d ground, upon which the plaintiffs contended that the 30*l.* should be made up, is, that it appears the sugars would have sold for that price, if the damage from the sea water had not made an immediate sale necessary. The moment the jury brought in their verdict, I was satisfied that they did right, in totally disregarding the particular circumstances of this case: and I wrote a memorandum at *Guildhall*, in my note-book, that the verdict seemed to me to be right. As I expected that the other cause upon the same point would be tried, I thought a good deal upon the question, and endeavoured to get what assistance I could, by conversing with

some gentlemen of experience in adjustments. The point has now been fully argued at the bar; and the more I have thought, and the more I have heard upon the subject, the more I am convinced, that the jury did right to pay no regard to these circumstances.

The nature of the contract is, that the goods shall come safe to the port of delivery; or, if they do not, that the insurer will indemnify the plaintiff to the amount of the prime cost, if they arrive, but lessened in value; in order to indemnify the owner, he must be put in the same condition in which he would have been if the goods had arrived free from damage: that is, by paying such proportion or *aliquot* part of the prime cost, as corresponds with the proportion or *aliquot* part of the diminution in value occasioned by the damage.

The duty accrues upon the ship's arrival and landing her cargo at the port of delivery: the insured has then a right to demand satisfaction. The adjustment can never depend upon future events or speculations. How long is he to wait? a week, a month, or year?

In this case, the price rose: but if the congress had taken place, or a peace had been made, it would have fallen. The defendant did not insure that there should be no congress or peace. It is true Mr. *Bourdieu* acted upon political speculation, and ordered the sugars to be kept till the price should be 30*l.* and upwards; but no private scheme or project of trade of the insured can affect the insurer; for he knew nothing of it. The defendant did not undertake that the sugars should bear a price of 30*l.* a hogshead. If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience: the underwriter knows nothing of them: the orders here were given after the policy was signed. But the decisive answer is, that the insurer has nothing to do with the price; and that the right of the insured to a satisfaction arises immediately upon their being landed at the port of delivery.

We are of opinion, that the plaintiffs are not entitled to have the price, for which the damaged sugars were sold, made up

See Goldsmid v. Gillies, 4 Taunt. 80.

up 30*l.* *per* hogshead: and it seems to us as plain as any proposition in *Euclid*, that the rule by which the jury have gone is the right measure.

Le Cras v. Hughes, B. R. East. 22 G. 3. Vide post. c. 14.

In a subsequent case, which will hereafter be mentioned for another purpose, Lord *Mansfield* said, that the case of *Lewis* v. *Rucker* should be the rule in all similar cases, that is, wherever there was a specific description of casks or goods: but in *Le Cras* v. *Hughes*, the property, which consisted in various goods taken from an enemy, was valued at the sum insured, and part was lost by perils of the sea; consequently the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that sum, as the amount of the goods lost.

Johnson v. Sheddon, 2 East's R. 581.

The rule by which a partial loss, occasioned by sea-damage, is to be ascertained, has lately undergone much discussion; and a very able and elaborate judgment was pronounced on the occasion by Mr. Justice *Lawrence*, who began that judgment by declaring, that the loss is to be estimated by the rule laid down in *Lewis* v. *Rucker*, that the underwriter is not to be subjected to the fluctuation of the market; that the loss, for which alone he is responsible, is the deterioration of the commodity by sea-damage; and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. The parties agreed that the damage was to be ascertained by considering, whether the commodity was a third, a fourth, or a fifth worse; and it was also agreed, that that could only be done by the price at the port of delivery. But the only question was, whether that price was to be ascertained by the *net proceeds*, or by the *gross produce*. *But the Court held, that the calculation was to be made on the difference between the respective gross proceeds of the same goods when sound and when damaged, and not on the net proceeds.* The main stress of the argument in favour of the judgment is this, that by taking the net proceeds as the basis of the calculation, instead of the gross proceeds, it will happen, that where *equal* charges are to be paid on the sound and damaged commodity, the

the underwriter will be affected by the fluctuation of the market, which he ought not to be. Thus, suppose sound goods, including all charges, sell for 600*l.* the damaged for 300*l.* let the charges on each be 100*l.*, the difference, after they are deducted, will be 300*l.* or three-fifths. But let the goods come to a fallen market with the same degree of deterioration, let the sound sell for 300*l.*, the damaged for 150*l.*, and deduct the charges as before, the net proceeds of the one will be 220*l.* the other 50*l.*, so the underwriter will in this case have to pay three-fourths. But as the deterioration is the same in both cases, the underwriter should pay the same, whatever be the state of the market, which he will do if the *gross* produce be taken, namely, half the valued or invoice price. Another consequence of taking the *net* produce will be, that the underwriter will be made responsible for a loss not arising from the deterioration of the commodity by *sea damage*, but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged; one being subject to duties and charges, and the other to none: the degree of deterioration being the same, the underwriter should pay alike in both cases. Suppose then the cargoes to be deteriorated one half, and the demand and the state of the market the same, and that the goods, if sound, would sell for 1000*l.*, but being damaged, for 500*l.*, and the charges to be 200*l.* On those goods, where no charges are to be paid, the insurer will have to pay one-half, or 50*l.* *per cent.* The goods, where charges are to be paid, being equally good with the other, will sell for the same sum, and when 200*l.* are deducted for charges, will in one case leave a *net* produce of 800*l.*, in the other of 300*l.*; and thus, if the underwriter were to pay according to this calculation, he would pay five-eighths instead of four-eighths, or one-half: not because the one cargo has suffered more than the other by the sea, for the supposition is that the sea-damage is the same in both; but from commodities of unequal value being subjected to equal duties and charges. (*a*)

(*a*) Space is not allowed to give the whole of the learned Judge's argument; therefore the reader is referred to the Report.

Usher v. Noble, 12 East, 639. In a very late case it was argued, that the rule in *Lewis* v. *Rucker* did not apply to open policies; but the Court held, that the rule for estimating any loss of goods insured by an open policy, is to take the invoice price at the port of loading, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods: and the rule for estimating a partial loss in the like case is the same as upon a valued policy, by taking the proportional difference between the selling price of the sound and that of the damaged goods at the port of delivery, and applying that proportion with reference to such estimated value at the loading port to the damaged portion of the goods.

Since the 19th of *Geo.* 2. the constant usage has been to let the valuation fixed in the policy remain, in case of a total loss, unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly over-valued the goods: but a partial loss opens the policy. This custom, said Lord *Mansfield*, was introduced by Lord Chief Justice *Lee*, in a
M. 21 G. 2. case of *Erasmus* v. *Banks*: and in another case of *Smith* v. *Flexney*, which happened about the same period, the same rule of decision was adopted. (*a*)

2 Mag. 228. By the ordinances of *Hamburgh* it is declared, that in case of a damage to goods, the assured is not to open the damaged goods, but in the presence of the assurers or their deputies;

(*a*) In a case upon an insurance on a ship from *Liverpool* to the coast of *Africa*, *valued at* 6000*l.* it was admitted that the valuation was fair when the ship sailed, but at the time of the loss had become greatly diminished by consumption of stores and provisions. But the Court were unanimously of opinion that the rule mentioned in the text must be abided by, where there is no fraud. *Shaw* v. *Felton*, 2 *East's Rep.* 109.

Where a party had insured his ship with the *London* Assurance Company for 6000*l.*, valuing it at 8000*l.*, and by the policy in question valued it at 6000*l.*, but only 600*l.* were subscribed, Lord *Ellenborough* was of opinion, that on such a valued policy it was no defence to prove that the assured had received the whole amount of the valuation in *this* policy from the underwriters on another, if the subject matter insured be proved to be of a value equal to the sum received, and that sought to be recovered. Thus the plaintiff has only received 6000*l.*; he has therefore an interest of 2000*l.* to which he may apply this policy. But as only 600*l.* have been subscribed upon it, when he recovers that sum, he will still be a loser of 1400*l.* by the total loss of the vessel. *Bousfield* v. *Barnes*, 4 *Campb.* 228.

but

but if time and circumstances do not give opportunity to call them, yet the goods must not be opened, but in the presence of a notary and some witnesses. I can find no such regulation in the law of insurances in *England*, nor do I understand that any such is adopted in practice. Indeed it seems to be needless; because an assured, in order to entitle himself to recover for a partial loss, must prove by disinterested witnesses, to the satisfaction of the jury, the quantity of goods damaged in the course of the voyage. The parties may, however, insist upon being present.

It will be proper here to remark, that some goods are of a perishable nature; and therefore, when they are damaged by such natural and inherent principle of corruption in themselves, the underwriters, by the ordinances of most countries, are held to be discharged. The underwriters of *London* have, indeed, by express words, inserted in their policy, declared, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded. This clause was introduced by the underwriters, to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of those commodities which we have just had occasion to enumerate. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off again, the insured recovered a small partial loss against the *London* Assurance Company; since which period the companies have left out the words "*or the ship be stranded*," and are now only liable in cases of a general average; but the old form is still retained by private insurers.

Ordinances of France, Stockholm, and Hamburgh.

Vide Appendix, No. I.

Cantillon v. the London Assu. Company, cited in 3 Burr. 1553.

There have not been many cases in the common law of *England* upon the meaning of the word *stranding*. In a case at *Guildhall*, Lord *Kenyon* told the jury, that ships running on some wooden piles, four feet under water, erected in *Wisbeach* river, about nine yards from the shore, but placed there to keep up the banks, *and lying on such piles till they were cut away*, was a stranding within the policy, so as to subject the underwriter to an average loss on corn.

Dobson v. Bolton, sittings after East. 1799.

Macdougall v. The Royal Exchange Assurance Company, 1 Starkie, 130. 4 Campb. 283.

But it is not *every touching* or *striking* upon a fixed body in the sea or river that will *constitute a stranding*. Thus Lord *Ellenborough* held, that in order to establish a stranding, the ship must be *stationary*; for that merely striking on a rock, and remaining there a short time, (as in the case then at the bar, about a minute and a half,) and then passing on, though the vessel may have received some injury, is not a stranding. Lord *Ellenborough's* language is important. *Ex vi termini*, stranding means lying on the shore, or something analogous to that. To use a vulgar phrase, which has been applied to this subject, if it is *touch and go* with the ship, there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's motion. If by the force of the elements she is run a-ground, and becomes stationary, it is immaterial whether this be on piles, on the muddy bank of a river, or on rocks on the sea shore: but a mere *striking* will not do, *wherever* that may happen. I cannot look to the consequences without considering the *causa causans*. There has been a curiosity in the cases about stranding not creditable to the law. A little common sense may dispose of them more satisfactorily.

52 G. 3. ch. 39.

In another case in the King's Bench, the question of stranding was much considered. By the 52 *G.* 3. ch. 39. the general pilot act, the captain of every ship is obliged to take licensed pilots, where they can be had, under a penalty. But sect. 30. provides that no owner or master of any ship shall be answerable for any loss, *nor prevented from recovering upon any insurance*, by reason of any neglect, default, &c. of any pilot taken on board under any of the provisions of that act. Thus where a ship, under the conduct of a pilot, in her course up the river to *Liverpool*, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, left there, *and she took the ground*, and when the tide left her she fell over, by which seed (the subject-matter insured) was damaged: the Court held this to be a stranding, it not being essential to constitute *a stranding that it be the consequence of storms*, it being a sea peril, and immediately occasioned by sea water upon the strand.

See Thompson v. Whitmore, 3 Taunt. 227.

And

And the Court held, that though this pilot was appointed under a local *Liverpool* act of 37 *G.* 3. c. 78., yet the general pilot act above referred to expressly refers to pilots duly appointed within particular districts. This man was regularly appointed; and s. 30. of the general act decides, that the misconduct of such an one shall not prevent the assured from recovering upon any insurance.

Upon this clause in the policy there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for a partial loss to such commodities unless the ship be stranded: and that no loss of such commodities shall be deemed a total one, but the absolute destruction of the thing insured: for that while it specifically remains, though perhaps wholly unfit for use, no loss has happened within the meaning of this memorandum. It may also be proper to premise that *corn* is a general term, and includes many particulars; peas and beans, and malt, have been held to come within the meaning of the word, though rice has lately been held not to be so considered.

Mason v. Skurray. Vide post, Moody v. Surridge, Sitt. bef. Ld. Kenyon, after Hil. 1798. Scott v. Bourdillion, 2 New Rep. 213. Journu v. Bourdieu, Sitt. after East. Term, 27 G. 3. Wilson v. Smith, 3 Burr. 1550.

But in the Court of Common Pleas Mr. Justice *Wilson* was of opinion, that the term *salt* used in the memorandum did not include salt-petre.

An action upon a policy of insurance was brought for the recovery of 56*l.* 19*s.* 8*d.* *per cent.*, being the damage received by a cargo of wheat on board the *Boscawen*, insured at and from *Lancaster* to *Rotterdam*. The wheat was valued by agreement at 30*s.* *per* quarter. The policy was in the ordinary form, with the usual clause at the bottom, that corn, fish, fruit, *&c.* should be warranted free from average, unless general, or the ship be stranded. The defendant underwrote this policy for 100*l.* The defendant having pleaded the general issue, the cause came on to be tried; and a special case was reserved for the opinion of the Court, stating, that after the ship's departure from *Lancaster*, and before her arrival at *Rotterdam*, she met with a violent storm: that she was, by and through the force of winds and stormy weather, obliged to cut away, and leave her cable and anchor, for the safety of the ship and cargo: that she was also greatly damaged, and

obliged to run to the first port to refit: that the expence of refitting the ship amounted to 38*l.* 15*s.* *per cent.*, which the defendant in this case had paid, being a general average. The case then states, that the hatches were not opened at *Liverpool* (the place where she had gone to repair); but the ship, being refitted, proceeded on her voyage, and arrived at *Rotterdam*, where her cargo of wheat was landed: that upon her unloading it, it appeared that it had received partial damage by the said storm to the amount of 56*l.* 19*s.* 8*d.* *per cent.*

The single question was, upon the true construction and meaning of the words, "*free from average, unless general, or* "*the ship be stranded,*" whether the plaintiff, as there had been a general average, could under the circumstances recover in this action for the damage of 56*l.* 19*s.* 8*d.* *per cent.* partial average, though the ship had not been stranded. After two arguments, the Court gave judgment for the defendant.

Lord *Mansfield*. — "Policies of insurance, according to their present form, are very irregular and confused: an ambiguity arises in them from using the same words in different senses; particularly, in the use of the word *average*. It is used to signify a contribution to a general loss: and it is also used to signify a particular partial loss. But whether it be considered in one, or other of these senses, it will not avail the plaintiffs in this case. For if it here signify a *contribution*, the insurer is to be free from contribution, unless the contribution be general. If it signify *loss*, then plainly it is warranted free from all particular loss. The insurer is liable to all losses arising from the ship being stranded; and in all cases, where there is a general average: but all other partial losses are excluded by the express terms of the policy.

The word "unless" means the same as "except;" and never can be construed as a condition, in the sense that the counsel for the plaintiffs would put upon the word "condition," namely, to be free from partial loss, unless in two events, *viz.* a general average, or the stranding of the ship: but if either of those events did happen, then to be liable to all

all other average. The words "free from average unless general," can never mean to leave the insurer liable to any particular damage. It is clear then that the plaintiff ought not to recover; and that judgment ought to be given for the defendant."

A question has arisen upon the construction of the memorandum. It was an action brought upon a policy of insurance to recover against the underwriters for a *total* loss of the cargo upon a voyage at and from *St. John's Newfoundland*, to her port of discharge in *Portugal*. The jury found a verdict for the plaintiff, subject to the opinion of the Court upon a special case. Cocking v. Fraser. B.R. 25 Geo. 3. Vide ante, p. 25.

The case states, that the ship sailed from *Newfoundland* on the 2d of *December* 1783, with a cargo of fish: that on the 11th they hove overboard 40 quintals for the general preservation of the ship and cargo: that on the 20th, they threw over 26 quintals more for the same purpose. The ship had exceeding bad weather, till her arrival at *Lisbon*, on the 10th of *January* 1784, when a survey was had at the request of the captain, who was also the consignee of the goods, by the Board of Health; and it appeared to them, and so the fact was, that the cargo was rendered of *no value* through the dangers of the sea. The ship did not proceed from *Lisbon* upon her destined voyage. The defendant has paid into Court the amount of the partial loss sustained by the ship, and also the general average upon the cargo. (*a*)

Lord *Mansfield*. — "Most litigations arise from improper statements of cases, and from not properly defining terms. This clause relative to fruit and fish, is now a very old one in policies of insurance. The insurer undertakes for all losses, except particular damage, unless the ship be stranded: he engages against a total loss. What is a total loss? The total loss of the thing insured is the *absolute destruction* of it, by the wreck of the ship. The fish may all come to port; though,

(*a*) I have had an opportunity lately of stating the facts of this case correctly from the paper-book of one of the learned judges who decided it. See my observations at the end of the case.

 from

from the nature of the commodity, it may be damaged, it may be stinking: still as the commodity *specifically* remains, the underwriter is discharged."

The other judges concurred, Mr. Justice *Buller* observing, that from the first introduction of the clause in the year 1749, till the present time, the underwriter never has been held answerable for total losses, but in cases where there has been a total loss of the commodity.

The case of *Cocking* v. *Fraser* has had many observations made upon it, and it has been supposed by very able judges to have gone too far. Lord *Kenyon*, in the case of *Burnett* v. *Kensington*, (*post.* 189.) said, "that he could not subscribe to the dictum of Lord *Mansfield*, in *Cocking* v. *Fraser*, that if the commodity specifically remain, the underwriter is discharged." And Lord *Alvanley*, in delivering his opinion in *Dyson* v. *Rowcroft*, (*post.* 183.) supposes himself at liberty to consider the case of *Cocking* v. *Fraser* as something less strong than it appears to be, in consequence of what fell from Lord *Kenyon*. But with the greatest possible deference to both these very learned judges; there is nothing objectionable in the doctrine laid down in *Cocking* v. *Fraser*, if the circumstances of that case, and to which circumstances alone Lord *Mansfield*'s doctrine is applicable, are considered. In the case of *Cocking* v. *Fraser* there was no stranding, as in *Burnett* v. *Kensington*; there was no disability in the ship to proceed to her destination, as in *Dyson* v. *Rowcroft*, which, therefore, created a total loss of the voyage. In *Cocking* v. *Fraser* it is most evident, nothing being stated to the contrary, that the reason why the ship did not proceed to her port of destination was because the cargo was of *no value* through perils of the sea; this, therefore, was a voluntary, and not a compulsory abandonment of the further prosecution of the voyage, which will not, therefore, warrant an abandonment as for a total loss, nor could the assured recover as for partial loss, because the cargo was one enumerated in the policy. Mr. Serjeant *Marshall*, in his Treatise on the Law of Insurance, has made this clear, for he has said, "*therefore* the ship did not proceed to *Figara*." Since I published the fifth edition of this work, I have been favoured

Marshall, 2d edit. 288.

by a learned judge now living, with the paper-book of one of the learned judges who decided the case of *Cocking* v. *Fraser*, and neither the special case, nor does my private note contain the word *therefore:* but it is quite apparent that the above learned author has only inserted as a consequence, what every body must discover to be so, in sense and reason. I have ever understood it to be due to every judge, to take his words with reference to the case before him, and not to state his doctrine in the abstract, or as a general proposition without allusion to the particular circumstances of the case then in judgment. Looking at the case of *Cocking* v. *Fraser*, in this view Lord *Mansfield's* doctrine is no more than this: "If the "commodity (being one of the enumerated cargoes) spe-"cifically remain, though it may be so damaged as to render "it, on that account, the subject of total loss, if it had not "been included in the memorandum, the underwriter is dis-"charged, because there has neither been a stranding, nor "has the voyage of the ship been put an end to *by any of the* "*perils mentioned in the policy*, but because the assured did "not chuse, on account of the state of the cargo, to proceed "to the port of destination." The wisdom of such a decision is apparent, for otherwise it would be a constant temptation to the assured, whenever a cargo of this description was not likely to reach the port of destination in a *sound* state, by giving notice of abandonment, to throw a loss upon the underwriters, by voluntarily giving up the further prosecution of the voyage, to which they are not liable by the terms of the memorandum.

Dyson and others v. Rowcroft, 3 Bos. & Pull. 474.

On such grounds as these, I conceive, it was that the case of *Dyson* v. *Rowcroft* was decided.' It was an action on a policy on fruit on board the ship *Tartar*, at and from *Cadiz* to *London*, with the usual memorandum. The plaintiffs were interested in the fruit. The *Tartar* sailed upon the voyage insured with the fruit on board: but having met with tempestuous weather and contrary winds, was forced to put into *Palma*, and afterwards into *Santa Cruz*. In the course of this voyage the fruit received so much damage from the sea-water, that, on its arrival at *Santa Cruz*, it was rotten and stunk to so great a degree, that the government prohibited the landing it, and it was, therefore, thrown overboard. *The ship*

also was so much damaged in the course of the voyage, as to be unable to proceed upon the voyage, and was necessarily sold. On this special case, the question came before the Court.

Lord *Alvanley*.—"If I understand the policy, as restrained by the memorandum, the underwriter agrees, that all commodities shall arrive safe at the port of destination, notwithstanding the perils insured against; but that he will not be liable to pay for any partial loss on fish, or the other articles contained in the memorandum, because those commodities being liable to deterioration, from many circumstances independent of the peril insured against, he would continually be harassed with claims for partial loss alleged to have arisen from the perils mentioned in the policy. Unless, therefore, the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable; but if the commodity be totally lost to the assured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expressed; and the underwriters would have done better if they had said, that they would not be answerable, unless the commodities enumerated actually went to the bottom. The question is, What is a total loss? I admit that the circumstances of cases like the present are generally suspicious. If the voyage be protracted, deterioration necessarily takes place; and it becomes the interest of the captain and mariners to turn the injury into a total loss. But this is a matter for the consideration of a jury. We ought, indeed, to look at the case with some suspicion, where there is so much temptation to throw the cargo overboard. But here it is found that the necessity of so doing arose from sea-water shipped during the course of the voyage; and that the commodity was in such a state, that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been so annihilated it would have been annihilated by putrefaction: and is it not as much lost to the assured, by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction? The case of *Cocking* v. *Fraser* was the only thing which raised any doubt in my mind, and it is certainly

tainly a very strong case. But the authority of that case is much shaken by the observation of Lord *Kenyon* upon it, in *Burnett* v. *Kensington*. I suspect that the words "of no value," applied to the cargo in the case of *Cocking* v. *Fraser*, are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but that it was so much damaged as to be no longer valuable to the owners, because it was not worth carrying to the port of destination. Lord *Kenyon*, speaking of *Cocking* v. *Fraser*, says, that he cannot subscribe to the opinion there given, that "if the commodity specifically remain, the underwriter is discharged." I think myself, therefore, at liberty to consider the case of *Cocking* v. *Fraser*, as something less strong than it appears to be. The question then is, Whether the loss, which has happened, be not as much a total loss as if the waves had carried the cargo overboard, or, as if it had been directly prevented from arriving at the port of destination, by some of the perils insured against? I never have understood that the underwriters insure fish against no perils, which do not end in a total annihilation of the commodity. When the loss arises from capture the commodity remains in existence in the hands of the enemy; and yet this loss is as much within the policy as a loss arising from the wreck of the ship. I must now take it, that the circumstances, under which the cargo in this case stood, were such that sea-damage had so operated as to make it impossible for the captain to keep it any longer on board. Whether the cause of the loss were direct or indirect, it produced a total annihilation of the commodity." The other judges concurred, and there was judgment for the plaintiffs.

Nor is the substance of Lord *Mansfield*'s doctrine, in *Cocking* v. *Fraser*, very different from what fell from Lord *Kenyon* in the following case:

M'Andrews v. Vaughan Sittings at G. H. after Mich. 1793.

For in an insurance on fruit from *Lisbon* to *London*, it appeared that the ship was captured, and re-captured, brought into *Portsmouth*, and afterwards arrived at *London*: but the cargo, by the capture, re-capture, and consequent length of the voyage, had sustained a damage of 80*l.* *per cent.* The assured,

assured, however, never heard of the capture till the ship was safe at *Portsmouth*, and then he offered to abandon.

Lord *Kenyon*.—"As there has been no stranding, there cannot be a recovery for a partial loss. The question then is, Whether the assured can recover for a total loss? Had the plaintiff heard of the capture only, he might have abandoned: but he hears nothing of the accident till the ship is in safety. The cargo arrives at the port of destination; and though it is good for very little, yet it has invariably been held that the voyage must either be lost, or the cargo, if it be one of those mentioned in the memorandum, must be wholly and actually destroyed to entitle the assured to recover." The plaintiff was nonsuited.

Anderson v. The Royal Exch.Assur. Company, 7 East, 38.

And in another case, where the right to abandon a cargo of corn under proper circumstances was admitted, still that abandonment must be made in a reasonable time, while the loss continues total in its nature. But the assured must not, instead of abandoning, take to the cargo nearly during a month, and work it as upon his own account, never electing to abandon till the whole cargo is nearly taken out, and till he finds it will not answer to keep it. This was a case of stranding; but the underwriters in this company are only liable in case of total losses, or where the average is *general*, leaving out the clause respecting a stranding of the ship. (*a*)

(*a*) Where underwriters on goods exempt themselves from particular average, where the ship was wrecked, the goods brought on shore, so damaged, as to become unprofitable, an abandonment could not turn this into a total loss, as the thing existed. *Thomson* v. *Royal Exchange Assur. Co.* 16 *East*, 214.

Insurance upon *rice free of particular* average, from *Charlestown* to *Liverpool;* the ship arrived at *Liverpool;* but before she came to her moorings, she ran aground, and was wrecked, and the *whole* cargo greatly damaged, taken out in craft, carried to the consignees at *Liverpool*, and sold, and produced little more than freight and salvage; but the *rice* did not produce sufficient to pay the freight. The Court were of opinion this was a case of *particular* average only, and therefore the underwriter was exempted by the warranty. *Glennie* v. *The London Assur. Comp.* 2 *M. & S.* 371. *Davy* v. *Milford*, 15 *East*, 559., was referred to as an authority for this decision.

The

The effect of the memorandum has been also recently discussed by the whole Court, in an action on a policy on *wheat* and coals, the declaration stating the loss to be by *detention*. It appeared in evidence that the ship was forced by stress of weather into *Elly* harbour in *Ireland*, and there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove upon a reef of rocks, where she was stranded, and they would not leave her till they had compelled the captain to sell all the corn (except about 10 tons) at a certain rate. The 10 tons were lost in consequence of the stranding, by which it was damaged, and obliged to be thrown overboard. The ship afterwards arrived with the rest of the cargo at the place of destination. A verdict was found as for a total loss. A motion was made for a new trial. There were other points in the cause, one of which has been already considered. As to this upon the memorandum,

Nesbitt v. Lushington, 4 Term Rep. 783.

See ante, p. 124.

Lord *Kenyon* said — " This being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless general, or the ship be stranded. And I am of opinion that this is not a general average; because the whole adventure was never in jeopardy. There is no pretence to say that the persons, who took the corn, intended any injury to the ship or any other part of the cargo but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a perishable nature: as it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies, to prevent disputes; and by it the underwriters expressly provide they will not pay any average unless general, or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained.

Therefore

Therefore here all the damage done to the cargo thrown overboard may be ascribed to the stranding; but the objection is, that the declaration imputes the loss to another cause."

Mr. Justice *Buller*. — " With respect to the objection, that this does not fall within the reason of the memorandum, there are only two instances, in which the owner may recover an average loss on the articles there enumerated; either where the average is general, or where the loss arises from the stranding of the vessel. Now this cannot be said to be a general average, for the reasons already given. And as to the other instance of stranding, the plaintiffs are entitled to recover for any loss occasioned to the cargo in consequence of the stranding, provided it be a direct and immediate consequence of stranding: but they cannot recover for that which was taken by the mob; for that was not the consequence of the stranding, but on the contrary, the stranding was occasioned by the mob coming on board for the corn. The rioters took possession of the ship in order to get at the cargo; but this loss cannot be ascribed to the stranding. Suppose the mob had taken out 100 quarters of corn before the ship had been stranded, and had used no threat to destroy the whole, if it were not delivered to them, it is clear that the underwriters would not be liable. Then the fact of their taking the corn after she was stranded is as much unconnected with that circumstance as if it had been before. But the loss which happened to that part of the cargo which was thrown overboard, being ascribable to the stranding, and being a direct and immediate consequence of the peril insured against, might have been recovered, had there been any count in the declaration applicable to a loss by stranding."

Still it remained a question, which has been much agitated in *Westminster* Hall, whether the words *unless stranded* were to operate as a condition, so as to allow the assured to recover for a partial loss of the commodity, if that event happened, though it could be shewn demonstrably that no part of the loss had arisen immediately from the act of stranding. Lord *Kenyon*, in a case before him at *Nisi Prius*, upon this subject, had been of opinion, that as the general mode of construing deeds, to which there are exceptions, was to let the

Bowring v. Elmslie, Sitt. after Trin. 1790.

the exception controul the instrument, as far as the words of it extend, and no further; and then upon the case being taken out of the letter of the exception, the deed operates in its full force; so the stranding of the ship put fish in the same condition as any other commodity not mentioned in the memorandum; for otherwise there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing the memorandum intended to prevent.

This point, however, still remained in doubt, till the famous cause of *Burnett* v. *Kensington*, which was as much discussed as any case that ever arose at *Guildhall*, and which, after three trials by jury, and two special arguments upon the case reserved at the last of those trials, was at last unanimously decided by the whole Court, in favour of the assured. It was an insurance on fruit, the policy containing the usual memorandum, and the declaration stated the loss to be that the vessel by the perils of the sea was *stranded*, bulged, and destroyed, whereby the goods were lost. The case stated that the vessel in the course of her voyage struck upon a sunken rock, on which she did not remain, but in consequence of it, several of her planks were started, and the water immediately flowed into the hold and over the cargo: that on the same day she was *stranded* at *Scilly*, by direction of the pilot for the preservation of ship and cargo. While she continued on the beach the water again flowed in over the cargo, which was very much damaged, and a small part was left at *Scilly* as wholly unfit for use. *The ship received no damage in consequence of the stranding.* The damage she received was entirely from the rock, on which she struck: part of the damage the cargo received was occasioned by the water flowing into the ship, previous to her being laid on the beach. and part was occasioned by the water that flowed in afterwards; but the cause of the water flowing in arose entirely from the ship striking on the rock, and not from any mischief done to the ship by the stranding. After full argument, and consideration of all the cases,

Burnett v. Kensington, 7 Term Rep. 210.

Lord

Lord *Kenyon* said — "The words of this policy are in general terms, including all cases; then comes this memorandum, "corn, fruit, *&c.* unless general, or the ship be stranded." This therefore lets in a general average; and I do not know how to construe the words grammatically, but by saying that if the ship be stranded, then it destroys the exception, and lets in the general words of the policy. If a general provision be made in any deed or instrument, and it is there said that certain things shall be excepted, unless another thing happen which gives effect to the general operation of the deed, if that other thing do happen, it destroys the exception altogether. My two opinions that have been referred to, the one in the *Nisi Prius* case, and the other in *Nesbitt* v. *Lushington*, have no weight with me as judicial authorities; but I confess I have not been able to extricate my mind from the reasoning that led me to the conclusion in those cases. Without inquiring into the reasons for introducing this exception, on the grammatical construction of the whole, I have no doubt." His Lordship then went into a consideration of the cases of *Cantillon* v. *The London Assurance Company*, *Wilson* v. *Smith*, and *Cocking* v. *Fraser*; and proceeded — "If it had been intended that the underwriters should only be answerable for the damage that arises *in consequence of the stranding*, a small variation of expression would have removed all difficulty; they would have said, "unless for losses arising *by* stranding." But in the body of the policy they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is, *free from average* unless general, or *unless the ship be stranded*; so that if the ship be stranded, the insurers say they will be answerable for an average loss. That appears to me to be the true sense and the grammatical construction of the policy; and therefore I am bound to give the same opinion I formerly gave, not because I gave that opinion, but because I am convinced by the reasoning that led to it."

Bowring v. Elmslie, supra.

Supra.

Ashhurst, *Grose*, and *Lawrence*, Justices, also delivered their opinions, and judgment was given for the plaintiff.

There

There is indeed a case in Sir *John Strange*'s Reports, which seems to militate against the above decisions of *Cocking* v. *Fraser* and *M'Andrews* v. *Vaughan*. Boyfield v. Brown, 2 Stra. 1065.

Upon the execution of a writ of inquiry before Lord *Hardwicke*, when Chief Justice, it appeared, that the defendant was an insurer to the amount of 200*l.* upon corn, the value of which was 217*l.*: that the corn was so damaged in the voyage, that it sold for 67*l.* only, and the freight came to 80*l.* The question upon this case was, Whether, as the freight exceeded the salvage, this was not to be considered a total loss? The Chief Justice was of opinion, that within the reason of deducting the freight, when the salvage exceeds it; the plaintiff in this case, wherein it fell short, was entitled to have it considered as a total loss. The jury accordingly found for the plaintiff.

Upon this case, it may be observed, that it was decided prior to the introduction of the clause, upon which so much has lately been said; and consequently, such a decision can have no weight now, because the law is altered on account of the agreement of the parties. Indeed the case I am about to cite was exactly similar in circumstances to *Boyfield* v. *Brown*: but Lord *Mansfield* in his charge to the jury gave a very different direction, and the jury found accordingly.

It was an action brought on a policy of insurance on goods, on board the *Happy Recovery*, at and from *London* to *St. Augustine*, to recover for a total loss. The cargo was *peas*, which, in a former case on the same policy, were held to fall within the general denomination of *corn*, in the memorandum at the foot of the policy (*a*). The peas arrived at the place of destination; but being much damaged, the produce of them was less by about three fourths than the freight, which on account of the ship's arrival at the port of discharge, became due. The defence set up by the underwriter was, that if the goods mentioned in the memorandum arrive at the Mason v. Skurray, Sittings after Hil. Term, 1780, at Guildhall, Vide ante, 179.

(*a*) But the Court of Common Pleas held that *Rice* is not *Corn* within the meaning of this memorandum. *Scott* v. *Bourdillion*, 2 *New Rep.* 213.

market,

market, though a loss amounting to a total one has happened, the underwriters are not liable. Four or five witnesses conversant in settling losses upon policies being called, proved, that the usage was, in such cases, to hold the underwriters discharged.

Lord *Mansfield* told the jury — "This was a question of consequence, and it turned upon the general import of the exception: the witnesses examined have put it on that point; and they hold, that if the specific thing come to the port of delivery, the underwriter cannot be called on. How did this matter stand before the year 1749? When the policy was general, and operated as an indemnity, there was little difference between a total and a partial loss. His Lordship here stated the determination of *Boyfield* v. *Brown*, which, he observed, was prior to the clause in question. But the cases now stand upon the memorandum, which is in very general words. The question is, whether the usage has not explained the generality of the words? If it has, every man who contracts for a policy under usage, does it as if the point of usage were inserted in his contract *in terms*. The witnesses examined all swear it to be *understood*, that if the specific thing comes to market, the memorandum warrants the insurer to be free from any demands for an average, or partial loss." The jury found for the defendant.

The case of *Boyfield* v. *Brown* has certainly been overturned by this decision, which was recognized as a proper determination in the case of *Baillie* v. *Modigliani*, before cited, where Mr. Justice *Buller* said, that the case in *Strange*'s Reports had been expressly over-ruled by the Court in the case of *Mason* v. *Skurray*.

Vide ante, c. 2. p. 93.

When the quantity of damage sustained in the course of the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to endorse on the policy, "*adjusted this loss, at so much per cent.*," or some words to the same effect. This is called an adjustment.

It

It has been held by Lord *Ellenborough*, that if an agent had subscribed the policy, and had authority so to do, he has also authority to sign the adjustment.

Richardson v. Anderson, Sittings after Mich. 1805. 1 Campbell, 4. note.

It has been determined, that after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it. This, it is said, has been the invariable custom upon this subject; which seems perfectly just, as the underwriter has under his hand expressly admitted, that the plaintiff has sustained damage to a certain amount. To be sure, if any fraud were discovered in obtaining the adjustment, that might be a ground for setting it aside: but supposing the transaction fair, as we must always do till proof is given to the contrary, the rule of not suffering the adjustment to be contradicted is fair and equitable.

Hog v. Gouldney, Sittings after Trin. 1745, at Guildhall, Beawes Lex Mer. 310.

An action was brought by the plaintiff against the defendant, on a policy of insurance, which the latter underwrote in *November* 1743, on the ship *George* and *Henry*, Captain *Bower*, at and from *Jamaica* to *London*, with a warranty annexed to the policy, that the ship should sail from *Jamaica* with the fleet that came out under convoy of the *Ludlow Castle* man of war. The ship sailed with the fleet under that convoy, but was damaged so much, as to oblige her to bear away for *Charlestown*, where she was condemned and broken up. The plaintiff demanded his insurance; and all the underwriters, being satisfied of the truth of the case, paid their loss, except the defendant, who went so far as to settle it, and, according to the custom upon these occasions, underwrote the policy in these words: "Adjusted the loss on this policy at ninety-"eight pounds *per cent.*, which I do agree to pay one month "after date. *London*, 5th *July*, 1745, *Henry Gouldney*."

When the note became due, he insisted on fuller proof, particularly of the ship's sailing with convoy, and her condemnation; but as it always was the custom, after adjustment and a promise to pay, never to require any further proof, but to pay the loss; and Lord Chief Justice *Lee* being of opinion that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss,

Beawes Lex Merc. 308.

the jury found a verdict for the plaintiff. The same rule was pursued in the following year in another case, before Lord Chief Justice *Lee*, between *Hewitt* and *Flexney*.

The words used by Lord Chief Justice *Lee* are extremely large, and perhaps the true rule upon the subject may be better collected from the two following more modern cases:—

Rogers v. Maylor, Sittings after Trin. 1790. Christian v. Combe, 2 Esp. Rep. 489. Acc.

Case on a policy of insurance on ship and goods from *London* to *Shelborne*, in *Nova Scotia*. The policy had been adjusted by the defendant at 50 *per cent.*, and it was contended, that he was now bound by that adjustment. On the other hand, it was argued that the adjustment was not binding; and that if it were, it ought to have been declared upon specially.

Lord *Kenyon* said, that he did not think it necessary to declare on the adjustment specially, that it was *primâ facie* evidence against the defendant; but if there had been any misconception of the law or fact, upon which it had been made, the underwriter was not absolutely concluded by it. This turned out to be the case; and there was a verdict for the defendant.

De Garron v. Galbraith, Sittings after Trin. 1795.

So in a still later case, the plaintiff went to trial, having no other evidence to produce but the adjustment; and the witness, who proved it, swore, that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay; upon which Lord *Kenyon* said, that under these circumstances the plaintiff must go into other evidence, which not being prepared to do, he was nonsuited. In the following term a motion was made to set aside the nonsuit, upon the ground that an adjustment was *primâ facie* evidence of the whole case, and threw the *onus probandi* upon the underwriter, and that it amounted to no more than proof of the defendant's subscription to the policy.

Michaelmas Term, 36 Geo. 3.

Lord *Kenyon*.—"I admit the adjustment to be evidence in the cause to a certain extent; but I thought at the trial, and still think, that when the same witness, who proved the signature of the defendant to the adjustment, said that doubts, soon after the adjustment took place, arose in the minds of the

the underwriters, as to the honesty of the transaction. and they called for further proof, the plaintiff should have produced other evidence: and that shutting the door against enquiry after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters." The rule was refused.

It has been lamented that this case has not been reported in the Term Reports, it being presumed that an *accurate* statement of the evidence would have clearly shewn that the decision of the learned Judge at *Nisi Prius*, and afterwards of the Court of King's Bench, was correctly right; that justice was done; and that under the particular circumstances of the case it might have been a very proper exception to the rule as laid down by Lord Chief Justice *Lee*. And then the learned author goes on to shew, that in his opinion the case of *De Garron* v. *Galbraith* is not reconcileable with *Rogers* v. *Maylor*; nor with that candour and fairness which ought to preside in the litigation of all commercial questions. Marshall, 2d edit. 635.

For the omission in the Term Reports I am not answerable: but as I was counsel in the cause of *De Garron* v. *Galbraith*, I can vouch for *the accuracy of the statement*: and being a case decided *by the Court* on motion, I confess it seems to me entitled to as much consideration as a case decided by a single Judge, however eminent that Judge may have been. Indeed, I do not see any great difficulty in reconciling the doctrine contained in the latter with that of *Rogers* v. *Maylor*, and *Christian* v. *Combe*. They all agree, that the effect of the adjustment is to throw the *onus probandi* upon the underwriter: and if, immediately after signing, doubts arise about the honesty of the transaction, and those doubts are instantly communicated, the assured ought not, with a knowledge of this, and that the same witness, who proves the adjustment, can also prove the communication of the doubts, to proceed to trial upon the adjustment only, as he did in *De Garron* v. *Galbraith*, for then he has had the notice, which the learned author alluded to thinks ought to be given, that the fairness of the transaction would be disputed. The only objection I ever made to the case of *Hog* v. *Gouldney* is, that Lord Chief Justice *Lee* lays down the rule too generally, being stated

 without

without any exception, whereas the rule does admit of exceptions. But nobody ever presumed to find fault with that decision, where it probably was not necessary to state the exceptions. But still the comparison, without an exception, might mislead; for a promissory note, the signature being proved, only shifts the burden of proof of fraud on the defendant. I, therefore, still think the rule respecting adjustments is to be better collected from the modern cases. And in addition to the cases heretofore decided upon the subject, I have now to bring forward the opinion of Lord *Ellenborough*, who has, as I conceive, in two very modern cases, confirmed the notion entertained by Lord *Kenyon* and the Court of King's Bench in his time. In *Hibbert* v. *Champion*, the ship *Ganges* had sailed from the *Downs*, under convoy of the *Fury* sloop of war, on the 12th *December* 1805, for *Portsmouth*, and before her arrival there, was captured by a *French* privateer. The defence was, that a letter from the captain, dated 5th *December*, stating, that he was to sail with the *Fury*, though received on the 6th *December*, had not been communicated to the underwriter before effecting the policy, which was not done till the 12th, the broker having said only that the ship had sailed about three weeks. To this it was said, that the defendant, after reading the letter in question, with several others written subsequently, had, on the 12th *March* 1806, adjusted the policy, on which adjustment the plaintiff relied, and compared it to the case of an actual payment. But

Hibbert v. Champion, reported under the name of Herbert v. Champion, 1 Campbell, N. P. Cases, p. 134.

Lord *Ellenborough* said—"If the money has been actually paid, it cannot be recovered back, without proof of fraud: but a promise to pay will not, in general, be binding, unless founded on a previous liability. What is an adjustment? It is an admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove. An underwriter must make a strong case, after admitting his liability: but until he has paid the money, he is at liberty to avail himself of any defence, which the facts or the law of the case will furnish" It is quite evident, that His Lordship here considered an adjustment as shifting the

See Bilby v. Lumby, 2 East, 469.

 burden

burden of proof from the assured to the underwriter; but by no means shutting out the latter from any ground of defence, which either the law or the facts would supply. In the particular case the jury thought the letter relied upon, would have made no difference; but it was submitted to their consideration by Lord *Ellenborough*: and the plaintiff had a verdict.

The other case was where the plaintiff in an action on a policy, from *Liverpool* to *Provence*, with or without letters of marque, had given in evidence an adjustment on the policy signed by the defendant, and proved that, previously to its being signed, an account had been posted up at *Lloyd's*, which the defendant must have seen, stating, *that the ship on her way out had chased every thing that she saw*, and had at last been captured in the Gut of *Gibraltar*, through the cowardice and mismanagement of the master. The defendant, when he signed the adjustment, said, it was not likely the ship should have been lost by cowardice, when the captain was killed in the engagement. On the part of the defendant it was proved, that the ship, from the time of her sailing from *Liverpool*, had been in the constant habit of cruizing for prizes; and, therefore, it was said to be a deviation. On the other side it was contended, that as no fraud was practised upon the defendant, when he signed the adjustment, and as the notice had informed him of the supposed deviation, it was to be considered as conclusive against him. But

Shepherd v. Chewter, 1 Campbell, N. P. 274.

Lord *Ellenborough* said, the adjustment was *primâ facie* evidence against the defendant: but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case; unless they were all blazoned to him as they really existed(*a*). Therefore if the jury should think that the defendant, by reading the notice stuck up at *Lloyd's*, had his attention drawn only to the manner in which the ship was captured, and *was not roused to the previous deviation with which he*

Reyner v. Hall, 4 Taunt. 725.

(*a*) An adjustment and payment shall not prevent the mistake from being set right, if there was a mistake in fact; and that whether the name of the underwriter was struck off both the adjustment and policy. See *post.* Ch. on Return of Premium; *May* v. *Christie*, where there appears a knowledge of the facts at the time of the settlement.

 afterwards

afterwards became acquainted, his liability to the assured would be discharged, notwithstanding the adjustment. His remark, when he signed the adjustment, seems to shew, that he had then only considered the conduct of the master at the moment of the capture: and the expression of the ship having chased every thing, did not of necessity imply a deviation, since from carrying a letter of marque she might be considered as at liberty to chase, so that she continued in the line of the voyage. (*a*)

Thelluson v. Fletcher, Dougl. 301. The spirit of this rule was adopted in an insurance upon goods, on board a *foreign ship*, "the policy to be deemed "sufficient proof of interest in case of loss." The defendant suffered judgment to go against him by default; and on a motion to set aside the writ of enquiry, the Court of King's Bench said, that although such a policy would be void, if made upon a ship of this country, by virtue of the statute of the 19th *Geo.* 2. c. 37., yet the statute did not extend to policies on foreign ships: and in this case the underwriter, having suffered judgment to go by default, has confessed the plaintiff's title to recover; and the amount of that loss was fixed by his own stipulation in the policy, and which he cannot now controvert. Vide post. c. 14.

One rule relative to adjustments remains still to be mentioned, which is, that if an insurer pay money for a total loss, and in fact it be so at the time of adjustment; if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But substantial justice is done by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.

Da Costa v. Firth, 4 Burr. 1966. post. This rule was settled by the King's Bench in the year 1766. It was an action on the case for 200*l.* upon an *indebitatus assumpsit*, for so much money had and received to the use of the plaintiff. *Non assumpsit* was pleaded, and issue joined. It was brought by the insurer against the insured, to recover back what he had paid him. At the trial a case was reserved

(*a*) I cannot close this subject without saying, that the Reporter, Mr. *Campbell*, has, at the close of the last case, inserted a very sensible and learned note upon the effect of an adjustment.

for the opinion of the Court. The facts were; that a policy had been underwritten by the plaintiff, for the insurance of any of the packet boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as His Majesty should direct, for one whole year, commencing the 1st of *October* 1763, and to continue to the 1st of *October* 1764, inclusive, upon any kinds of goods and merchandizes whatsoever: and it was agreed, that the goods and merchandises should be valued at the sum insured on such packet-boat, without farther proof of interest than the policy, and to make no return of premium for want of interest, being on bullion or goods.

The case then states, that the defendant had an interest in bullion on board the *Hanover* packet, being one of the King's packets between *Lisbon* and *Falmouth*; that on the 2d of *December* 1763, it was totally lost off *Falmouth*, in a voyage between *Lisbon* and *Falmouth*; and the loss was adjusted in writing under the policy, in the words following: — "Adjusted a loss on this policy at 100*l.* *per cent.*, the *Hanover* packet, Captain *Sherborn*, being totally lost at *Falmouth*. Should any salvage hereafter be recovered, the insured promises to refund to the insurer whatever he may so recover, in such proportion as the sum insured bears to the whole interest. *London*, 23 *October* 1764, for *Richard Seward*, *Michael Firth*."

The insurer paid the whole money insured, which was 200*l.* In *April* 1765, the iron trunk, which contained all the bullion, was fished up; and thereby all the bullion was recovered without prejudice, and delivered to the defendant. The defendant's expence of salvage amounted to 63*l.* 8*s.* 2*d.*, and deducting that sum for salvage, the nett proportion of his share came to 206*l.* 11*s.* 9*d.* The plaintiff's proportion thereof, in respect of his subscription, amounted to 48*l.* 4*s.* which was paid into Court.

The question was, Whether the plaintiff was entitled to recover?

The Court held, that this was a policy of a peculiar sort; Vide post. c. 14.
and that it was good within the exception of the 19th *Geo.* 2.

 c. 37.,

c. 37., which says, that certain policies of a particular form shall be void, except on effects from any port in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal*. This is a mixed policy; partly a *wager* (*a*) policy, partly an open one: it is a valued policy, and fairly so, without fraud or misrepresentation. Therefore the loss having happened, the insured is entitled to recover as for a total loss. The insurer agreed to the value; and cannot be allowed to dispute it. The insured has received the money for a total loss; and there is no want of conscience in retaining it. The cases cited at the bar, only tend to shew, that where it appears, *before* adjustment, to be but a *partial loss*, the underwriter shall pay no more than the *real* damage; the reason of which decision is, that the insured must shew the whole case as it then stood. But in the present case, there was a total loss *at the time* of the adjustment. The adjustment in this case makes an end of the question. Here is a solemn abandonment, and a solemn agreement, "that the insurers shall be content with "salvage, in such proportion as the sum insured bears to the "whole interest." There was a total loss at the time of the adjustment (which is the same as if the damages had then been recovered in an action). Here is no sort of fraud, nor any thing that is against any law: and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore the nett proportion only, in respect to the plaintiff's subscription after deduction of salvage, ought to be returned, and that is paid into Court. The *postea* was ordered to be delivered to the defendant.

(*a*) Is not this a mistake of the Reporter; should not the word be *valued*, and not *wager*?

CHAPTER VII.

Of General or Gross Average.

AVERAGE, in that sense in which we are now to consider it, signifies a contribution to a general loss: but in order to satisfy the reader, it will be necessary to give a more particular description of it. 3 Burr. 1555.

Whatever the master of a ship in distress, with the advice of his officers and sailors, deliberately resolves to do, for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard to lighten his vessel, which is what is meant by jettison or jetson, is in all places permitted to be brought into a general or gross average; in which all who are concerned in ship, freight, and cargo, are to bear an equal or proportional part of the loss of what was so sacrificed for the common welfare: and it must be made good by the insurers in such proportions as they have underwritten. In the works of writers upon commercial affairs, we very often meet with the word Contribution, also signifying the thing just described: and in a marine sense, average and contribution are synonimous terms. Mag. 55. Beawes, 147.

Mr. Justice *Lawrence* says,—" All loss which arises in consequence of extraordinary sacrifices or expences incurred for the preservation of the ship and cargo, come within the description of general average. A description which Lord Chief Justice *Mansfield* adopts.

Birkley v. Presgrave, 1 East, 220. Covington v. Roberts, 2 N. R. 378, where the vessel carrying a press of sail to avoid a privateer, sustained damage, and the Court held it was not a general average.

This obligation, which, by the laws of all the maritime countries in *Europe*, binds the proprietor of the goods or ship saved to contribute to the relief of those whose goods are thrown overboard, is founded on the great principle of distributive

tributive justice: for it would be hard that one man should suffer by an act, which the common safety rendered necessary: and that those who received a benefit from that act should make no satisfaction to him who had sustained the loss.

Leg. Rhod. 3. 2. art 9

This obligation, which is tacitly entered into by all who have property at sea, was introduced by the *Rhodians*. Their laws most equitably enacted, that all the property on board should contribute to this necessary and general loss; and in modern constitutions we find very little alteration in the doctrine of averages, from that established at *Rhodes*. Similar regulations were made by the laws of *Wisbuy*, and, as I have already said, they are now become general. From *Molloy* we learn, that the *Rhodian* laws upon this subject were introduced into *England* by *William* the Conqueror.

Laws of Wisbuy, art. 20. l. c. 6. s. 3.

Beawes Lex Merc. 148.

Beawes is of opinion, that in order to make the act of throwing the goods overboard legal, three things must concur.

1st, That what is so condemned to destruction, be in consequence of a deliberate and voluntary consultation held between the master and men.

2dly, That the ship be in distress, and that sacrificing a part be necessary in order to preserve the rest.

3dly, That the saving of the ship and cargo be actually owing to the means used with that sole view.

But of these the first and third propositions may be doubted, as the second point alone seems to be all that is necessary.

Laws of Wisbuy, art. 20.

It appears, also, by the laws of *Wisbuy*, that in an emergency of such a nature as to justify lightening the ship, it was necessary first to consult the owner of the goods or the supercargo: but if they would not consent, the merchandize might, notwithstanding their refusal, be ejected, if it appeared necessary to the rest of the people on board; a regulation evidently founded in necessity, to prevent a sordid individual from obstructing a measure so essential to the general safety.

Laws of Oleron, art. 8.

If

If the ship ride out the storm, and arrive in safety at the port of destination, the captain must make regular protests, and must swear, in which oath some of the crew must join, that the goods were cast overboard for no other cause, but for the safety of the ship and the rest of the cargo. And as the law has authorized such proceedings in case of imminent necessity, it will protect those who act *bonâ fide*, and will indemnify them against all consequences. Thus in an action of trespass against a man for throwing goods overboard, he pleaded specially, that it was done in a storm, in a case of necessity, *navis levandæ causâ*; and if that act had not been done, that the passengers must all have perished. The Court held, that the plea was good, and the defendant had judgment.

Beawes, 148. Molloy, b. 2. c. 6. s. 2.

Mouse's Case, 12 Co. 63.

It is evident, from one of the rules above stated, that there can be no contribution, without the ejection of some goods, and the saving of others; but it is not always necessary for the purpose of contribution, that the ship should arrive at the port of destination.

If the jettison does not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved; because the object, for which the goods were thrown overboard, was not attained. But if the ship, being once preserved by such means, and continuing her course, should afterwards be lost, the property saved from the second accident, shall contribute to the loss sustained by those whose goods were cast out upon the former occasion.

Ord. Lew. 14. tit. Contribution, art. 15. 16. Ord. of Hamburgh, 2 Mag. 240. Ord. of Rotterdam, 2 Mag. 98. But see page 202.

Magens, in his preliminary Essay on Insurances, advances a different doctrine, and contends, that if a ship be saved by throwing goods overboard, and afterwards perish by another calamity, the goods saved shall not contribute to the former loss. He puts a case to illustrate his meaning; but the ordinances above referred to, as will appear from the abstract of them in the preceding paragraph, directly contradict his positions, although he seems to have had those ordinances in view when he advanced them. It was necessary to say thus much, because the doctrines of such an useful writer are often received implicitly; erroneous opinions are adopted and confirmed,

1 Mag. 56.

1 Mag. 57. confirmed, because they are not accurately examined; and the more respectable the writer is, the greater is the danger which is to be apprehended. But what is still more remarkable, in the very next paragraph to that I last mentioned, he puts a similar case, in which he admits that the goods saved ought to contribute.

The writers upon this subject have stated with much minuteness and accuracy, the various accidents and charges, that will entitle the party suffering to call upon the rest for a contribution. I doubt whether it be necessary to be so particular in this place; because, we may gather in general from the description given of average at the beginning of this chapter, that all losses sustained, and expences incurred voluntarily and deliberately, with a view to prevent a total loss of the ship and cargo, ought to be equally borne by the ship and her remaining lading. Beawes Lex Merc. 148.

In the first six editions of this work, it was stated, that the damage sustained, in defending a ship against an enemy or pirate, such as the expence of curing and attendance upon the officers or mariners wounded in such defence, is a general average. For this position I had quoted 1 *Magens*, 64.: but there had been no decision in the law of *England* upon the point. The position from *Magens* was not without support in the foreign jurists. *Valin*, liv. 3., tit. 7., *Des Avaries*, art. 6., the ordinances of *Lewis* the 14th, and *Le Guidon*, ch. 5. art. 4. But *Emerigon*, ch. 12. p. 41. & n. 8., and others, maintain the contrary doctrine: and I believe it is quite clear that these expences, in point of practice, have never been placed to the account of general average. This subject has now undergone considerable discussion, having been very ably and elaborately argued in the Court of Common Pleas; all the authorities quoted on either side referred to by the Judges; and after time taken for deliberation, their unanimous judgment was pronounced by Lord Chief Justice *Gibbs*, that neither *the expence of repairing a ship*, injured by successfully resisting and beating off a privateer, thus reaching her desired port in safety; nor of *curing the wounds* of the sailors sustained in the action; nor the *ammunition* expended in the engagement, was the subject of general average. Taylor v. Curtis, 2 Marsh. 309.

Lord

Lord Chief Justice *Gibbs*. — "The doctrine of general average has its origin in the *Rhodian* law *de jactu*, "*omnium contributione sarciatur, quod pro omnibus datum est.*" The different states of *Europe* have made different regulations on this subject, all of them professing to follow the *Rhodian* law, but often differing from each other; and the foreign jurists have made very different comments on that law. In this country, there are no local regulations on this subject; we should, therefore, as in all doubtful cases, resort to the judgments of our municipal Courts, if this point had ever arisen there. There is nothing in any of the foreign jurists which we think ought to govern us on these points, unless they had been supported by admitted principles, decided authorities, or general usage. None of the decided cases apply to the present; and we have unfortunately been so long engaged in war, that instances of this kind must frequently have occurred: and as there appears to be no case, where a demand like the present has been made, we must conclude from that silence that no general usage, which could justify such a demand, has existed, and therefore that such losses cannot be taken to fall within the principle of general average."

Another charge usually claimed as general average was, according to *Beawes*, the sum which the master may have promised to pay for the *ransom* of his ship to any privateer or pirate, when taken. But, as we have seen in a former part of this work, ransoms are now prohibited by the law of *England*. (See ante, p. 111.) Beawes, 148.

A master who has cut his mast, parted with his cable, or abandoned any other part of the ship and cargo, in a storm, in order to save the ship, is well entitled to this compensation; but if he should *lose* them by the storm, the loss falls only upon the ship and freight; because the tempest only was the occasion of this loss without the deliberation of the master and crew, and was not voluntarily done with a view to save the ship and lading. Upon the same principle it is, that by the naval laws of *Wisbuy*, which in this respect, as well as in many others, have been adopted by modern states, it was declared, that when a ship arrived at the mouth of a harbour, and the master finding that his ship was too heavy laden to sail up, was Beawes, 148. Art. 56. Ordin. of France and Rotterdam, 2 Magens, 96. 183.

Molloy, tit. Average, s. 12. was obliged to put part of the cargo into hoys and barges; the owners of the ship and of the goods that remained were obliged to contribute, if the lighters perished. But if the ship should be lost, and the lighters saved, the owners of the goods so preserved were not to contribute to the proprietors of the ship and cargo lost. The difference is this, the lightening of the ship was an act of deliberation for the general benefit: whereas the circumstance of the lighters being saved, and the ship lost, was accidental, no way proceeding from a regard for the whole.

Beawes, 148. Molloy, l. 2. c. 6. s. 8. It is not only the value of the goods thrown overboard that must be considered in a general average; but also the value of such as receive any damage by wet, *&c.* from the jettison of the rest.

Beawes, 150. It is said, that if a ship be taken by force, carried into some port, and the crew remain on board to take care of and reclaim her, not only the charges of reclaiming shall be brought into a general average, but the wages and expences of the ship's company during her arrest, from the time of her capture, and being disturbed in her voyage. In this idea *Magens* concurs: and asserts, that such expences are allowed as average
1 Mag. 67. in *London* as well as elsewhere. He denies, however, and, as it seems, justly denies, that an allowance would be made under general average, for sailors' wages and victuals, when they are under a necessity of performing quarantine, in which case the master would have been obliged to maintain and pay them, though his vessel had arrived only in ballast. But at the same time he admits, that charges occurring by an extraordinary quarantine shall be brought into a general average.

It has however been a considerable question, Whether the extraordinary wages and victuals expended during the detention by a foreign prince not at war, ought to be brought into a general average, so as to charge the underwriter? *Magens* and *Beawes* differ upon the point; the latter being of opinion that it should, the former that it should not. In *England* there is no adjudged case, nor any regulation upon the subject; and therefore, the only mode by which this and similar

questions are to be decided, is to consider whether these expences were necessarily and unavoidably incurred for the general safety of the ship and cargo.

Lord *Mansfield* seems to have been of that opinion in an action upon a policy of insurance on a *ship*. It was brought to recover the amount of wages and provisions expended during the time the ship went from *Bengal* to *Bombay* to repair. His Lordship, as he has frequently done since upon similar occasions, decided against the action, being an insurance on the ship only, and the item in question being sailors' wages. But His Lordship said, there may be cases, where exceptions to the general rule should be allowed; but in order to consider a case as excepted, it must be an expence absolutely necessary, and such as could not be avoided, owing to some of the perils stated in the policy.

Lateward v. Curling, G. H. Sittings after Trin. 1776, Vide ante, 90.

His Lordship here seems to allude to a general average; but on a point, on which no authority can be adduced, I would not chuse that Lord *Mansfield's* words should be supposed to convey an idea, which perhaps the speaker never intended. It does not become me to hazard an opinion; and therefore I shall leave it as a matter undecided; only observing, that by the ordinances of *Lewis* the Fourteenth, the charges in such a case shall be reputed general average, if the seamen be hired by the month; otherwise, if by the voyage.

Tit. Average, art. 7.

It may be proper before I close this branch of my subject, to state a paragraph I have met with, which confirms the idea entertained by Lord *Mansfield*. "Though it must be "noted," says this author, "that the charges of unloading "a ship, to get her into a river or port, ought not to be "brought into a general average; but they may when occa- "sioned by an indispensable necessity to prevent the loss "of ship and cargo. As when a ship is forced by a storm "to enter a port to repair the damage she has suffered, if "she cannot continue her voyage without an apparent risk of "being lost; in which case the wages and victuals of the "crew are brought into an average from the day it was re- "solved to seek a port to refit the vessel, to the day of her

Beawes, 150

"de-

" departure from it, with all the charges of unloading, re-" loading, anchorage, pilotage, and every other expence in-" curred by this necessity."

Da Costa v. Newnham, 2 TermRep. 407.

Since the first edition of this work, a question nearly similar came before the Court of King's Bench, in which Mr. Justice *Buller* quoted the above passage from *Beawes*, as also the case of *Lateward* v. *Curling* in the preceding page: and although the learned judge thought it then unnecessary to decide the point here agitated, yet the leaning of his mind seemed to be in favour of the affirmative. This, however, was held by the whole Court,—that where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of *the workmen hired for the repairs*, become general average.

Power v. Whitmore, 4 Maule & S. 141.

But this point has lately come directly into discussion in a case in the King's Bench, where that Court held, in opposition to the passage in *Beawes*, and to the inclination of Mr. Justice *Buller*'s opinion, in *Da Costa* v. *Newnham*, that the wages and provisions of the crew, while the ship remained in port, whither she was compelled to go for the safety of the ship and cargo, in order to repair a damage occasioned by tempest, were not the subject of general average. They also held that the expences of the repairs themselves were not general average; nor were the wages and provisions of the crew during her detention in port to which she had returned, and was detained there on account of adverse winds and tempests: nor was the damage occasioned to the ship and tackle by standing out to sea with a press of sail in tempestuous weather, in order to avoid an impending peril of being driven on shore and stranded. See this case for another point in the chapter on Bottomry.

See Covington v. Roberts, ante, p. 201. See post. ch. 21.

Plummer v. Wildman, 3 M. & S. 482.

But where a ship in the course of her voyage is run foul of by another, and the captain is *obliged* to cut away the rigging, and to return to port to repair the damage and cutting away; without which it was found the vessel could not have prosecuted her voyage, nor kept the sea with safety; the Court held, that the expences of repairs, *so far* as they were absolutely

lutely and unavoidably necessary for the general safety of the whole concern, but no further; and the unloading for the purpose of repairs were a general average. But the captain's expences during the unloading, repair, and reloading, the ship-owner must bear — and crimpage for replacing deserted seamen is not general average.

By the ancient laws of *Rhodes*, *Oleron*, and *Wisbuy*, the ship, and all the remaining goods, shall contribute to the loss sustained. The most valuable goods, though their weight should have been incapable of putting the ship in the least hazard, as diamonds or precious stones, must be valued at their just price in this contribution, because they could not have been saved to the owners but by the ejection of the other goods. Neither the persons of those in the ship, nor the ship-provisions, nor respondentia bonds, suffer any estimation; nor does wearing apparel in chests and boxes, nor do such jewels as belong to the person merely; but if the jewels are a part of the cargo, they must contribute.

De leg. Rhod. s. 2. art. 8. Oler. art. 8. Wisb. art. 20. Molloy, l. 2. c. 6. s. 4.

Vide post. ch. 21. Joyce v. Williamson.

Those who carry jewels by sea ought to communicate that circumstance to the master; because the care of them will be increased in proportion to their worth, to prevent their being thrown overboard promiscuously with other things: and hence their preservation will be a common benefit. 1 Mag. 63.

Both by law and custom, the wages of sailors are not to contribute to the general loss; a provision intended to make this description of men more easily consent to a jettison, as they do not then risk their all, being still assured that their wages will be paid. 1 Mag. 71.

The way of fixing a right sum, by which the average ought to be computed, can only be, by examining what the whole ship, freight, and cargo, if no jettison had been made, would have produced nett, if they had all belonged to one person, and been sold for ready money. And this is the sum whereon the contribution should be made, all the particular goods bearing their nett proportion. 1 Mag. 69.

Ord. of Genoa and France. In no respect whatever do the ordinances of foreign states differ so much, as in the manner of settling the contribution of the ship and freight. In some places, the ship contributes for the whole of her value and freight; in others, for the half of her value, and one-third of her freight: and again, in others, both ship and freight are to contribute for one-half. 2 Mag. 207. 237. 339. By the laws of *Koningsberg*, *Hamburg*, and *Copenhagen*, the ship is to contribute for the whole of her value and freight. They also declare, that the value of the ship shall be that which she was worth when she arrived; and that from the freight a deduction shall be made of the men's wages, pilotage, and such other charges, as come under the name of petty average, of which it is customary every where, as we have Vide the last chapter. before observed, for the cargo to bear two-thirds, and the ship one.

The *English* writers upon commerce are totally silent in this respect; and therefore custom must be our guide: and I think from that we may collect, that the ship, freight (*a*), and cargo, are to bear an equal and proportional part of what was so sacrificed for the common good.

The sea laws of different countries vary no less than upon the former question, in fixing at what prices goods thrown overboard shall be estimated, and for what value those saved are to contribute.

2 Mag. 100. 235. 339. By the ordinances of *Rotterdam*, *Stockholm*, and *Copenhagen*, if the accident, which occasioned the general average, happened before half the voyage was performed, the jettison was to be estimated at prime cost; but if after that period, then at the price for which such goods would sell, at the place of discharge, freight, duties, and ordinary charges deducted. Molloy, tit. Aver. s. 15. That distinction is now, however, exploded in *England*, and the custom has become general of estimating the goods saved and lost, at the price for which the goods saved were sold; freight and all other charges being first deducted. This rule

(*a*) It has been held by the whole court of King's Bench, that freight must contribute to the general average. *Da Costa* v. *Newnham*, 2 Term Rep. 407. *Williams* v. *London Assurance Company*, 1 M. and S. 318.

is

is agreeable to the marine laws of *Wisbuy*, which declare, that the goods thrown overboard shall be brought into a gross average, and shall be rated at the same price for which other merchandize of the same sort, preserved from the sea or enemy, was sold. This custom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malyne*, that in 1622, the distinction was observed of estimating the goods at prime cost, if the jettison happened before half the voyage was performed; and if after, at the price the rest of the goods sold for, at the place of discharge. However, *Molloy* is a more modern authority; and *Magens* says, that the prevailing mode of settling averages now adopted in *England* is conformable to that rule, which has abolished the distinction.

Leg. Wisb. art. 20.

Malyne Lex Merc. 1st part, c. 26.

Gold, silver, and jewels, at most places, contribute to a general average, according to their full value, and in the same manner as any other species of merchandize. It has been said, that an immemorial custom has prevailed at *Amsterdam*, that gold and silver shall only contribute for half their value: the reason for such a custom, one is at a loss to conjecture. In *England* no such custom prevails; but money and jewels must fall into the general average at their full price: and a modern writer assures us, that the practice was such in *London* when he wrote; and such I believe it to be at this day.

1 Mag. 62.

Molloy, tit. Average, s. 4.

1 Mag. 62.

In a late case, the doctrine here advanced was mentioned and confirmed by Mr. Justice *Buller*, as clear law.

Peters v. Milligan, Sittings at Guildhall after Mich. 1787.

The contribution is in general not made till the ship arrive at the place of delivery: but accidents may happen, which may cause a contribution before she reach her destined port. Thus when a vessel has been obliged to make a jettison, or, by the damages suffered soon after sailing, is obliged to return to her port of discharge; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average.

Roccus de Navibus, Not. 96.

1 Mag. 60.

Thus I have endeavoured to lay before the reader an idea of what is meant by average; and, in order to do that more distinctly, I have defined what average is; I have shewn its

origin;

origin; and what the necessary requisites are to render the act, whence averages arise, legal. I then stated in general what accidents or expences would authorize the suffeier to call for a contribution; the different kinds of property that were subject to such contribution; and lastly, the mode by which the value of this property was to be ascertained.

It only remains now to state, that the insurers are liable to pay the insured for all expences arising from general average, in proportion to the sums they have underwritten. *Roccus* says, "*Jactu facto, ob maris tempestatem, pro sublevanda navi,* "*an teneantur ass curatores ad solvendum estimationem rerum* "*jactarum domino ipsarum? Dic eos non teneri, quia pro rebus* "*jactis fit contributio inter omnes merces habentes in illa navi pro* "*solvendo pretio domino ipsarum, et ideo si assecuratus recu-* "*perat pretium rerum jactarum, non potest agere contra asse-* "*curatores: tamen tenentur assecuratores ad reficiendum illam* "*ratam et portionem, quam solvit assecuratus in illam contri-* "*butionem faciendo inter omnes, habentes merces in illa navi,* "*quæ portio cum non recuperetur ab aliis, habetur pro deperdita,* "*et proinde ad illam portionem tenentur asseccuratores.*"

Roccus de assecurationibus, Not. 61.

The opinion of this learned civilian is agreeable to the laws of all the trading powers on the continent of *Europe*, as well as to those of *England*, where the insurer, by his contract, engages to indemnify against all losses arising from a general average.

In former editions of this work, I had contented myself with stating the nature of general average, and that the sums paid on this account might be recovered against the underwriters. But I had omitted to state what remedy the person, whose goods were thrown overboard, or who had expended money for the general preservation of ship and cargo, had against those, whose goods or ship were preserved by such means. In the case of an expenditure of money, *probably* an action for money paid *might* be maintained against each of those who were benefited by such expenditure. But as this would lead to a multiplicity of actions; and this species of action is not applicable to the case of goods thrown overboard, the better mode in all cases seems to be to apply for contri-

contribution to a court of equity, where effectual relief may be obtained against all the parties in one suit. (*a*) Com. Dig. tit. Chancery. (2 I) & Shower's Parl. Cas.

(*a*) Since the fourth edition of this work was published, this point has come under solemn discussion in the court of King's Bench; and the learned Judges of that court were unanimously of opinion, that a special action of *assumpsit* may be maintained by the owner of a ship against the owner of part of the cargo, to recover from him his proportion of a general average loss, incurred by cutting the cable and part of the tackle of the ship, and applying them to a use, for which they were not originally intended, for the general preservation of the whole concern. *Birkley* v. *Presgrave*, 1 *East's Rep.* 220.

CHAPTER VIII.

Of Salvage.

SALVAGE is so necessarily connected with the two former chapters, that it will be proper to take it into consideration here, before we proceed to the other parts of this enquiry.

Beawes Lex Merc. 146.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies: and it is also sometimes used to signify the thing itself which is saved; but it is in the former sense only, in which we are at present to consider it.

Kaime's Princ. of Eq. Introd. p. 6.

Leg. Rhod. s. 2. art. 45, 46, 47.

The propriety and justice of such an allowance must be evident to every one; for nothing can be more reasonable than that he, who has recovered the property of another from imminent danger by great labour, or perhaps at the hazard of his life, should be rewarded by him who has been so materially benefited by that labour. Accordingly, all maritime states, from the *Rhodians* down to the present time, have made certain regulations, fixing the rate of salvage in some instances, and leaving it, in others, to depend upon particular circumstances.

The law of *England*, the decisions of which are not surpassed by those of any other nation in justice and humanity, was not backward in adopting a doctrine so equitable in its nature, and so beneficial to those whose property was endangered.

Hartford v. Jones, 1 Ld. Raym. 393. 2 Salk. 654.

Thus, in an action of trover, the defendants pleaded, that the goods, for which the action was brought, were in a ship which took fire, and that they hazarded their lives to save them: but that they were ready to deliver the goods, if the plaintiff would pay 4*l.* for salvage. The court, upon a general demurrer to this plea, were obliged to give judgment for the

plaintiff, because the special plea did not confess a conversion. But upon the general point, for which this case is cited, Lord Chief Justice *Holt* held that the defendants might retain the goods till payment of the salvage, as well as a taylor, an ostler, or a common carrier: and salvage is allowed by all nations; it being reasonable, that a man shall be rewarded, who hazards his life in the service of another. Therefore his lordship, in favour of so just a claim, allowed the defendant to waive his special plea, and plead the general issue.

As the propriety of such an allowance is admitted by all, the only difficulty that can arise upon the subject is, to ascertain in what proportions these gratuities and rewards must be allowed.

The laws of *Rhodes* fixed the rate of salvage in several instances, sometimes giving for salvage one-fifth of what was saved; at other times only a tenth; and at others, one-half. The regulations of *Oleron* left it more unsettled; and declared, that the courts of judicature should award to the salvers, such a proportion of the goods saved, as they should think a sufficient recompence for the service performed, and the expence incurred. Almost every state has regulations on this head peculiar to itself; and the legislature of this country has by various statutes expressed its ideas upon the subject. I shall first consider what rule it has established in cases of wreck, and then what the rate of salvage is in cases of recapture.

Vide the passages last cited. Leg. Oler. art. 4.

When a ship has been wrecked, the law of *England* has followed the laws of *Oleron* in declaring, that *reasonable* salvage only shall be allowed. But the statute will best shew the idea of the legislature.

It appears from the preamble, that the infamous practices, which a former statute, 27 *Edw.* 3. *c.* 13. had endeavoured to suppress, of plundering those ships which were driven on shore, and seizing whatever could be laid hold of as lawful prize, still continued; or that if the property were restored to the owners, the demand for salvage was so exorbitant, that the inevitable ruin of the trader was the immediate consequence. The statute, in order to prevent those mischiefs in

12 Ann. stat. 2. c. 18.

Sect. 1. future, enacted, that if a ship was in danger of being stranded or run ashore, the sheriffs, justices, mayors, constables, or officers of the customs nearest the place of danger, should, upon application made to them, summon and call together as many men as should be thought necessary to the assistance, and for the preservation of such ship in distress, and her cargo; and that if any ship, man of war, or merchantman, should be riding at anchor near the place of danger, the constables and officers of the customs might demand of the superior officer of such ship, assistance by his boats and such hands as could be spared: and that if the superior officer should refuse to grant such assistance, he should forfeit 100*l.*

Sect. 2. Then follows the section respecting salvage. "And for the "encouragement of such persons as shall give their assistance "to such ships or vessels, so in distress as aforesaid, be it "enacted, that the said collectors of the customs, and the "master and commanding officer of any ships or vessels, and "all others, who shall act or be employed in the preserving "of any such ship or vessel in distress, or their cargoes, "shall, within thirty days after the service is performed, be "paid *a reasonable reward* for the same, by the commander, "master, or other superior officer, mariners, or owners of "the ship or vessel so in distress as aforesaid, or by the "merchant whose vessel or goods shall be so saved; and in "default thereof, the said ship or vessel so saved shall remain "in the custody of the officers of the customs until all charges "are paid, and until the officers of the customs, and the "master or other officers of the ship or vessel, and all others "employed in the preservation of the ship, shall be *reasonably* "*gratified* for their assistance and trouble, or good security "given for that purpose, to the satisfaction of the parties that "are to receive the same: and if any disagreement shall take "place between the persons whose ships or goods have "been saved, and the officer of the customs, touching the "monies deserved by any of the persons so employed, it shall "be lawful for the commander of the ship or vessel so saved, "or the owner of the goods, or the merchant interested "therein, and also for the officer of the customs, or his "deputy, to nominate three of the neighbouring justices of the

16 "peace,

" peace, who shall thereupon adjust the *quantum* of the " monies or gratuities to be paid to the several persons " acting or being employed in the salvage of the said ship, " vessel, or goods; and such adjustments shall be binding " upon all parties, and shall be recoverable in an action at " law: and in case it shall so happen, that no person shall " appear to make his claim to all or any of the goods that " shall be saved, that then the chief officer of the customs of " the nearest port to the place where the said ship or vessel " was so in distress, shall apply to three of the nearest " justices of the peace, who shall put him or some other " responsible person in possession of the said goods, such " justices taking an account in writing of the said goods, " to be signed by the said officer of the customs: and if the " said goods shall not be legally claimed within the space of " twelve months next ensuing, by the rightful owner thereof, " then public sale shall be made thereof, and if perishable " goods, forthwith to be sold, and after all charges deducted, " the residue of the monies arising from such sale, with a fair " and just account of the whole, shall be transmitted to Her " Majesty's Exchequer, there to remain for the benefit of the " rightful owner, when appearing, who, upon an affidavit, or " other proof made of his or their right or property thereto, " to the satisfaction of one of the barons of the coif of the " Exchequer, shall, upon his order, receive the same out of " the Exchequer."

The statute of Queen *Anne* then goes on to declare, that any other persons than those mentioned in the preceding clause, endeavouring to enter such ship or vessel without the pemission of the superior officer of the ship, or of the officer of the customs, *&c.* or molesting or hindering them in the preservation of the ship, or defacing the marks of the goods on board of such ship, shall make double satisfaction to the party grieved, or, on default thereof, shall be sent to the house of correction for twelve calendar months: and that it shall be lawful for the officers of the ship to repel by force perons so endeavouring to enter without leave. Sect. 3.

It is also enacted, that if any goods, stolen from such ship, shall be found on any person, they shall be delivered up to the Sect. 4.

true

true owner; or, in default, such person shall pay treble the value.

Sect. 5. The next section declares, that any person boring holes in a ship in distress, or stealing a pump belonging thereto, shall be guilty of felony without benefit of clergy.

This act was made perpetual by the 4 *Geo.* 1. c. 12.; and as far as relates to our present subject, we can collect, that in cases of wreck, the rate of salvage is not fixed, but must be *reasonable*, that is, it must be a sufficient recompence to those who have encountered dangers for the preservation of the ship and cargo, regard at the same time being had to the circumstances of the owner of the property saved: and what shall be a sufficient recompence is to be ascertained by three justices of the peace.

Baring v. Day, 8 East's R. 57. The Court of King's Bench have lately found themselves under the necessity of declaring that this clause of the statute, referring the quantum of damage to the award of three justices of the peace, only applies to cases where application is made by or on behalf of the commander of any vessel in distress to certain public officers, and where the salvage is made through them and others employed by them. But it has omitted to provide for the case of persons employed in the salvage by the owners or their servants, where resort has not been had to the public officers. And the subsequent statute of 26 *Geo.* 2. ch. 19. applies to the case of persons volunteering their assistance to save the property, under no employment or requisition whatever, either by the owners or public officers.

In consequence of what fell from the Court in the above case, in an act soon after passed, "For preventing the various "frauds and depredations committed on merchants, ship "owners, and underwriters, by boatmen and others within the "jurisdiction of the Cinque Ports, and also for remedying "certain defects relative to the adjustment of salvage under a "statute made in the twelfth of Queen *Anne*," there are two clauses introduced affecting the whole kingdom (except the Cinque Ports, which are regulated by the prior provisions of the act), which are evidently aimed at the deficiencies discovered

covered by the Court in the former statute. "And whereas it "is expedient that the like means of conclusively adjusting and "recovering the *quantum* of the monies or gratuities to be paid "to the several persons acting or employed in the salvage of any "ship, vessel, or goods, should subsist and be by law applicable "in cases where the salvors shall have acted under and by the "mere employment and authority of the commander or other "superior officer, mariners, or owners of any ship or vessel in "distress, as now by law provided for adjusting the *quantum* of "such monies or gratuities which shall have become due in "cases where application shall have been first made to officers "of the customs, or other officer or officers in that behalf made "and appointed in and by a certain statute made in the twelfth "year of the reign of our late sovereign Queen *Anne*, intituled, "&c. be it therefore enacted and declared, by the authority "aforesaid, that from and after the passing of this act, all and "every means which in virtue of the statute last mentioned sub-"sist, and may now be by law applied for the conclusively ad-"justing, and for the recovering of the *quantum* of the monies or "gratuities to be paid to the several persons acting or being "employed in the salvage of any ship, vessel, or goods, in cases "where application shall have been first made pursuant to that "statute to officers of the customs, or other the officer or officers "therein in that behalf mentioned, and assistance shall have "been thereupon rendered and had in pursuance of the pro-"visions of that statute, shall be by law applicable and available "in like manner to all intents and purposes, and in cases where "the salvors shall have acted under and by the mere employment "and authority of the commander or other superior officers, "mariners, or owners of any ship or vessel in distress, although "no such application shall have been made to, nor any authority "or assistance derived from any officers of the customs, or "other the officer or officers in the said statute in that behalf "mentioned; and that upon payment or tender and refusal of "the *quantum* of monies or gratuities to be paid to the several "persons who shall have acted or been employed in such sal-"vage, or in case such payment or tender cannot be made, or "security being given for the due payment thereof to the "satisfaction of the justices who shall have adjusted such *quan-"tum* of gratuities, it shall not be lawful for any officer of the "customs, or other person or persons having the possession 48 Geo. 3. c. 130, s. 21.

"or

"or custody of such ship, vessel, or goods, any longer to re-"tain the possession or custody of the same, or any part "thereof, by reason or pretence of any claim or right to a "compensation or gratuity for such salvage as aforesaid, or "for having acted or been employed therein."

Sect. 22. "Provided always, that in cases where the salvors "shall have acted without application made to, or without any "authority derived from any officer of the customs, or other "officer in the said act mentioned, and the commander or "other superior officer, mariners, or owners of such ship or "vessel so saved as aforesaid, or the merchant or other person "whose goods shall be so saved, or their agents as aforesaid, "shall disagree with such salvors touching the *quantum* of the "monies or gratuity deserved by any person so employed as "aforesaid, it shall be lawful for the commander of such ship "or vessel so saved, or the owner of the goods, or merchant "interested therein, or their agents, and for such salvors as "aforesaid, to nominate three of the neighbouring justices of "the peace to adjust the *quantum* of the monies or gratuities "to be paid to such salvors, and in case the parties shall not "agree in such nomination, that then, on the application of "any of the parties to any one neighbouring justice of the "peace, the justice so applied to shall nominate two other "neighbouring justices of the peace; and such three neigh-"bouring justices shall and may thereupon, and they are "hereby authorized and required to adjust the *quantum* of the "monies and gratuities to be paid to all and each of such sal-"vors who shall disagree with such master, commanding "officer, merchant, or owners, or their agents as aforesaid, "touching the *quantum* of monies or the gratuity to be paid "to him or them respectively, for his or their having been "employed and acted in such salvage as aforesaid."

Notwithstanding this salutary statute of Queen *Anne* had passed, the enormities complained of still continued, to the disgrace of humanity and a civilized people; upon which the legislature were again obliged to interpose by a sub-
26 G. 2. c. 19. sequent statute, which I should perhaps not have mentioned, had it not contained some additional regulations respecting salvage

The

The statute ordains, that persons convicted of stealing goods from a ship wrecked or in distress, or of obstructing the escape of any person from a wreck, or of putting out false lights to lead such ship into danger, shall suffer as felons without benefit of clergy. But where goods of small value shall be stolen, without any circumstances of cruelty, the offender may be indicted for petty larceny. Justices of the peace, upon information of shipwrecked goods being stolen or concealed, are empowered to issue search-warrants; and the persons in whose custody they may be found, refusing to deliver them on demand, or to give a satisfactory account how they became possessed thereof, shall be committed to the common gaol for six months, or until payment of the treble value of such goods. Goods offered to sale, suspected of being shipwrecked, are to be stopped; and notice shall be immediately given to a justice of the peace; and if the person offering the same to sale cannot make out the property to be lawfully in him, the goods shall be returned to the owner, *upon a reasonable reward for such seizure (to be ascertained by the justice)*, and the offender shall be committed to the common gaol for six months, or until payment of the treble value of the said goods.

Sect. 1. Sect. 2. Sect. 3. Sect. 4.

And be it further enacted, " that in case any person or " persons, not employed by the master, mariners, or owners, " or other persons lawfully authorized, in the salvage of any " ship or vessel, or the cargo or provision thereof, shall, in " the absence of the persons so employed and authorized, " save any such ship, vessel, goods, or effects, and cause the " same to be carried for the benefit of the owners or pro- " prietors, into port, or to any near adjoining custom-house, " or other place of safe custody, immediately giving notice " thereof to some justice of the peace, magistrate, or custom- " house or excise officer, or shall discover to such magistrate " or officer, where any such goods or effects are wrongfully " bought, sold, or concealed, then *such person or persons* " *shall be entitled to a reasonable reward for such services*, to " be paid by the masters or owners of such vessels or goods, " and to be adjusted in case of disagreement about the " *quantum*, in like manner as the salvage is to be adjusted Sect. 5.

" and

Vide supra. "and paid, by virtue of a statute made in the 12th of Queen "*Anne*."

Sect. 6. "And be it further enacted, that for the better ascertaining the salvage to be paid in pursuance of the present act, "and the act before mentioned, and for the more effectual "putting the said act into execution, the justice of the peace, "mayor, bailiff, collector of the customs, or chief constable, "who shall be nearest to the place where any ship, goods, or "effects shall be stranded or cast away, shall forthwith give "publick notice for a meeting to be held as soon as possible "of the sheriff or his deputy, the justices of the peace, mayors, "or other chief magistrates of towns corporate, coroners, or "commissioners of the land-tax, or any five or more of them, "who are hereby empowered and required to give aid in the "execution of this and the said former act, and to employ "proper persons for the saving of ships in distress, and such "ships, vessels, and effects, as shall be stranded or cast "away; and also to examine persons upon oath, touching or "concerning the same, or the salvage thereof, and to adjust "the *quantum* of such salvage, and distribute the same among "the persons concerned in such salvage, in case of disagreement among the parties, or the said persons; and that every "such magistrate, *&c.* attending and acting at such meeting, "shall be paid four shillings a-day for his expences in such "attendance, out of the goods and effects saved by their care "or direction."

Sect. 7. "Provided always, that if the charges and rewards for salvage, directed to be paid by the former statute, and by this "act, shall not be fully paid, or sufficient security given for "the same, within forty days next after the said services performed, then it shall be lawful for the officer of the customs "concerned in such salvage, to borrow or raise so much "money as shall be sufficient to satisfy and pay such charges "and rewards, or any part thereof, then remaining unpaid, "or not secured as aforesaid, by or upon one or more bill or "bills of sale, under his hand and seal, of the ship or vessel, "or cargo saved, or such part thereof as shall be sufficient, "redeemable upon payment of the principal sum borrowed, "and

" and interest for the same, at the rate of 4 *per cent. per* " *annum.*"

The act also declares, that the commissioners of the land- Sect. 9.
tax, the deputy-sheriff, the coroner, and the officers of excise in each county, shall be the proper officers for putting these acts in execution, together with those persons respectively named in the act of Queen *Anne*. In the Cinque Ports, how- Sect. 10.
ever, the execution of these acts is intrusted to the lord warden of the Cinque Ports, the lieutenant of *Dover* Castle, the deputy warden of the Cinque Ports, the judge official and commissary of the Court of Admiralty of the Cinque Ports, two ancient towns, and the members thereof, and to all and every other person and persons appointed, or to be appointed by the lord warden of the Cinque Ports.

The statute proceeds to say, that persons convicted of as- Sect. 11. and 12.
saulting any magistrate or officer, when in the exercise of his duty respecting the preservation of any ship, vessel, goods, or effects, shall be transported for seven years; and the justices, in the absence of the sheriff, may take a sufficient force with them to repress violence. It directs, in the last place, that Sect. 15.
the officer of the customs who shall act in preserving any ship or vessel in distress, or the cargo thereof, shall cause all persons belonging to the said ship or vessel, and others who can give any account thereof, or of the cargo thereof, to be examined upon oath before some justice of the peace, as to the name or description of the said ship or vessel, and the names of the master, commander, or chief officer, and owners thereof, and of the owners of the said cargo, and of the ports or places from or to which the said ship or vessel was bound, and the occasion of the said ship's distress; which examination the justices are to take down in writing, and they shall deliver a true copy thereof, together with a copy of the account of the goods, to the officer of the customs, who shall transmit the same to the secretary of the Admiralty for the time being, that he may publish the same, or so much thereof, in the *London* Gazette, as shall be necessary for the information of persons interested therein. This act is not to extend Sect. 13.
to *Scotland*.

Thus

Thus anxiously has the legislature provided for the preservation of property wrecked, thereby diminishing those calamities which must unavoidably happen to all concerned in foreign commerce; and with no less anxiety and wisdom it has appointed certain magistrates to ascertain what shall be a sufficient allowance for the salvage of a ship or goods in cases of wreck. The necessity of leaving the *quantum* to the arbitration of proper persons, to be decided according to the circumstances of each case, is obvious; because it is impossible to suppose two instances of such a calamity so similar to each other, that the trouble, danger, and expence of both shall be exactly equal. It would be contrary, therefore, to the first principles of justice, to decide, that the same sum should be the allowance or recompence for every possible case of salvage. For instance, if a ship be found adrift at sea, having been abandoned by the master and crew, it seems reasonable, that the allowance for salvage should be greater than in a case where a man merely picks up goods cast upon the shore, and carries them to a place of security. Thus much for salvage in case of a wreck.

Vide ante, c. 4. p. 115. We have formerly seen, that when the ships or goods of *British* subjects were retaken from an enemy, the original owner was entitled, by the marine law, to have them restored, upon paying to the recaptors a reasonable salvage, provided the recapture was before condemnation. It was also observed, that the statute law had extended the right of the original owner; so that he was entitled to have his ship and goods restored to him, whether they were retaken after condemnation or before, however distant the time of recapture might be from that of the original taking. The statutes have also fixed the precise rate of salvage, which the recaptors shall be entitled to demand.

By the 13 *Geo.* 2. c. 4. and 29 *Geo.* 2. c. 34. Parliament fixed and ascertained the rate of salvage, in case of a recapture, proportioning the amount of the reward to the length of time the ship or goods had been in the possession of the enemy, because the longer they remained in the hands of the enemy, so much the less was the hope of recovery. At the same time, however, those statutes fixed a boundary, beyond which the allow-

allowance should not pass; namely, that in no case whatever, should the recaptors be entitled to more than a moiety of the property rescued from the enemy.

But the statutes 33 *Geo.* 3. c. 66. s. 42. and 43 *Geo.* 3. c. 160. s. 39. (which section see ante, p. 115.) has destroyed that proportion, and has ascertained the rate in all cases, however long the ship has been in the enemy's possession, to be one-eighth, if the recapture has been made by any of His Majesty's ships, and one-sixth, if made by a privateer or other ship.

It is said in the statute, that the salvage shall be a proportion of the ships and goods so restored: but a writer upon mercantile law observes, that the wearing apparel of the master and seamen are always excepted from the allowance of salvage. Beawes, Lex Merc. 147.

The statute has also said, it must be an eighth, or a sixth, *&c.* of the *true value.* Now the valuation of a ship, in order to ascertain the rate of salvage, may be determined by the policy of insurance, if there is no reason to suspect she is undervalued; and the same rule may be observed as to goods, where there are policies upon them. If that, however, should not be the case, the salvers have a right to insist upon proof of the real value, which may be done by the merchant's invoices, and they must be paid for accordingly. Beawes, 147.

The only question then is, how far the insurers are affected by this allowance of salvage. By their own contract, they expressly agree to indemnify the insured against such charges: " And in case of any loss or misfortune, it shall be lawful for " the assured, their factors, servants, and assigns, to sue, " labour, and travel for, in, and about the defence, safe- " guard, and recovery of the said goods and merchandizes, " and ship, *&c.* or any part thereof, without prejudice to this " insurance; to the charges whereof we the assurers will con- " tribute, each one according to the rate or quantity of his " sum herein assured." Vide the Appendix, No. I.

In the case of *Mitchell* v. *Edie*, (1 Term Reports, 608.) Mr. Justice *Ashhurst* said, it seemed to him, that the meaning of this clause was, that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment.

In order to entitle the insured to recover the expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy; because an insurance is against all accidents, and salvage is an immediate and necessary consequence of some of those stated in a policy.

Carey v. King, Cases in B. R. temp. Hardwicke, 304.

Thus in an action on a policy of insurance, for insuring goods on the ship *A.*, the plaintiff declared, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled: the evidence was, that many of the goods were spoiled, but some were saved. The question was, Whether the plaintiff might give in evidence, the expences of salvage, that not being particularly stated in the declaration, as a breach of the policy?

Lord *Hardwicke*.—"I think they may give it in evidence, for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river: it goes on and says, that by reason thereof the goods were spoiled. That is the only special damage laid; yet it is but the common case of a declaration that lays a special damage, where the plaintiff may give in evidence any damage that is within his cause of action. It was objected, that such a breach of the policy should be laid, that the insurer may have notice to defend it. Now it is so in this case, for they have laid the accident, which is sufficient notice, because it must of course follow that some damage did happen."

But although the insured may recover from the insurer the expences of salvage; yet he shall only be entitled to an indemnity, and shall not receive a double satisfaction for the same loss. Thus if the insurer should have paid to the insured the expences arising from salvage; and afterwards, on

account

account of some particular circumstances, the loss should be repaired by some unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.

It was so determined in a case before Lord *Hardwicke* in Chancery. The king having granted general letters of reprisal on the *Spaniards* for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only; although they were already satisfied for their loss by the insurers, who thereupon brought the present bill. The Lord Chancellor was of opinion, that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer becomes the owner. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the insured stands as a trustee for the insurer, in proportion for what he paid; although the commissioners did right in avoiding being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they see who was owner; nor was it material to them, to whom he assigned his interest, as it was in effect after satisfaction made.

Randall v. Cockran, 1 Ves. 98.

Cases, however, may, and do frequently arise, where the salvage is so high, the other expences are so great, and the object of the voyage is so far defeated, that the insured is allowed by the laws of all trading nations to abandon his interest in the property saved to the insurer, and to call upon him to contribute as if a total loss had actually happened. What circumstances shall be deemed sufficient to justify the assured in making such an abandonment, will be the subject of the following chapter.

CHAPTER IX.

Of Abandonment.

Chap. 4. p. 108. Pothier's Traité du Contrat d'Assurance, 133. Vide c. 6. p. 159.

WE have formerly seen, that the insured, before he can demand a recompense from the underwriter for a total loss, must cede or abandon to him his right to all the property that may chance to be recovered from shipwreck, capture, or any other peril, stated in the policy. It has also been observed, and from the preceding sentence it is obvious, that when we speak of a total loss, with respect to insurances, we do not always mean, that the thing insured is absolutely lost and destroyed: but that, by some of the usual perils, it is become of so little value, as to entitle the insured to call upon the underwriter to accept of what is saved, and to pay the full amount of his insurance, as if a total loss had actually happened. Indeed, the word abandonment conveys the idea, that the whole property is not lost; for it is impossible to cede or abandon that which does not exist. (*a*) When the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation.

See Randall v. Cockran, 1 Ves. 98. ante, c. 8. p. 227.

(*a*) And therefore the general convenience of making an abandonment has led to an opinion that it is more necessary than it really is. A party is not in any case obliged to abandon: neither will the want of an abandonment oust him of his claim for that which is, in fact, either an average or total loss, as the case may be. Where there is an abandonment, the risk is thrown on the underwriters; where there is no abandonment, the party takes the chance of recovering according to his actual loss. Without an abandonment, an average loss may be recovered: abandonment is only necessary to make a *constructive* total loss: but if a loss is *actually* total, no abandonment can be necessary. By Lord *Ellenborough*, in *Mellish* v. *Andrews*, 15 *East*, 13. and *Mullett* v. *Sheddon*, 13 *East*, 304. But, said His Lordship, upon another occasion, and quite consistently, (*Tunno* v. *Edwards*, 12 *East*, 491.) it is a clear, established, and familiar rule of insurance-law, that where the thing subsists in specie, and there is a chance of its recovery, there must be an abandonment.

From

From what has been said, then, it appears that abandonment dates its origin from the period at which the contract of insurance was itself introduced; because insurance being a contract of indemnity, the insured can recover no more than the amount of the loss actually sustained: but if he were allowed to recover for a total loss, and might also retain the property saved, he would be a considerable gainer, which the law will not allow. Accordingly we find, that the doctrine of abandonment has obtained a place in the laws of all the maritime nations in the world, where insurance has been known: and in all those laws the definition of it is the same, namely, that when any goods or ships that are insured, happen to be lost, taken, or spoiled, the insured is obliged to abandon such goods or ships for the benefit of the insurers, before he can demand any satisfaction from them. In this respect, also, they seem to be agreed, that when an abandonment is made, it must be a total, not a partial one; that is, one part of the property insured shall not be retained, and the other part abandoned; a regulation certainly founded in justice.

France, Rotterdam, Bilboa, Middleburgh.

Pothier, s. 128. Ord. of Lew. 14. art. 47. Ord. of Bilboa, 32.

The propriety and justice of abandoning in certain cases to the insurers being apparent, it will be proper to consider in what cases, and under what circumstances, the insured is entitled to exercise this power: for though in all cases the insured has a right to say, he will not abandon; yet he cannot at his pleasure harass the insurer, by saying he will abandon, and thereby turn that, which, in its own nature, was only a partial, into a total loss.

2 Burr. 697.

In questions of this nature, the opinion of learned foreigners must always have weight: because they are not questions of positive regulation, or municipal law: but of general and extensive import: not confined to any particular state, but founded on the great principles of reason, justice, and universal law. The learned *Roccus*, who has accurately examined the works of those writers that went before him, and who, after stating their various opinions, forms his own conclusions, has not been silent upon this occasion. He puts this question: "Assecurator, qui jam solvit æstimationem mercium deperditarum, si postea dictæ merces appareant et recuperatæ sint, an possit cogere dominum ad accipiendas illas, et ad red-

Roccus, No. 50.

"dendam sibi æstimationem quam debit?" He answers, "Distingue; aut merces, vel aliqua pars ipsarum appareant, et restitui possint, ante solutionem æstimationis, et tunc tenetur dominus mercium illas recipere, et pro illâ parte mercium apparentium liberabitur assecurator; nam qui tenetur ad certam quantitatem respectu certæ speciei, dando illam, liberatur; et etiam, quia contractus assecurationis est conditionalis, scilicet, si merces deperdantur; non autem dicuntur deperditæ, si postea reperiantur. Verum si merces non appareant in illâ pristinâ bonitate, aliter sit æstimatio, non in totum, sed prout tunc valent. Aut vero post solutam æstimationem ab assecuratore compareant merces, et tunc est in electione mercium assecurati vel recipere merces, vel retinere pretium."

Roccus, No. 66.

And although a subsequent passage in the same author may seem to contradict that just cited; yet when attended to, they are both perfectly consistent. He says, "sufficit semel extitisse conditionem ad beneficium assecurati de amissione navis, etiam quod postea sequeretur recuperatio; nam per talem recuperationem non poterit præjudicari assecurato."

From this passage it may be inferred, that a total loss having once happened, it must always continue so. But it must be understood, with reference to the context, and other parts of the work, from which it appears, that in order to entitle the insured to recover as for a total loss, it must continue total, at the time when the offer of abandonment is made, at the time of the action brought, or at the time of the payment of the money.

Chap. 7. s. 1.

In a *French* treatise, called *Le Guidon*, it is said, that the insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value of the thing; or if the voyage be lost, or so interrupted, that the pursuit of it is not worth the freight.

Ord. Lew. 14. Ord. of Bilb. Ord. of Rot. & Magens.

The same idea, with respect to the circumstances which will justify an abandonment, seems to prevail in almost all the foreign ordinances.

But

But in no country have the principles of abandonment been more accurately defined than in *England*: and it must be remembered, that the decisions, from which the following principles are selected, are of the greatest authority; that they are not merely the opinions of private speculative men, but the solemn and deliberate judgment of the grave and learned Judges of the *English* courts; judgments formed after mature deliberation and serious argument; established upon the solid and permanent *basis* of reason and good sense.

From those decisions we may collect, that the right to abandon must arise upon the object of the insured being so far defeated by a peril in the policy, that it is not worth his while to pursue it: such a loss as is equally inconvenient to him, as if it had been total. For instance, if the voyage be absolutely lost, 2 Burr. 1209. or not worth pursuing; if the salvage be very high, *suppose a half*; if further expence be necessary; if the insurer will not engage at all events to bear that expence, thought it should Guidon. c. 7. s. 1. exceed the value, or fail of success: under these, and many other like circumstances, the insured may disentangle himself, and abandon, notwithstanding there has been a recapture.

It is evident, that there may be circumstances in which it 2 Burr. 697 1213. would be contrary to every principle of justice to suffer the insured to abandon; for a ship might be taken, and escape immediately, which would be no hindrance at all to the voyage: or she might be taken and instantly ransomed, which would amount only to a partial loss; in which case the insured shall not be allowed to demand a recompence for a total loss.

It is also material to observe, that the right to abandon Burr. 1214. must depend upon the nature of the case at the time of the action brought, or at the time of the offer to abandon: a determination founded, as I have said before, on the nature of the contract between the parties; because an insurer ought never to pay less, upon a contract of indemnity, than the value of the loss; and the insured ought never to gain more.

From what has been said, it will appear sufficiently evident, 1 Term Rep. p. 191. that the owner cannot abandon, unless at some period or other

of the voyage there has been a total loss: and therefore, if neither the thing insured, nor the voyage be lost, and the damage sustained shall be found, upon computation, not to amount to a moiety of the value, the owner shall not be allowed to abandon.

These principles are fully illustrated and confirmed by the judgments given in the following cases.

Pringle v. Hartley, in Chancery, 1744. 3 Atk. 195.

The defendant had insured the ship *Success* from *London* to *Bermudas*, and so to *Carolina*; the ship was taken by a *Spanish* privateer, and afterwards retaken by an *English* privateer, and carried into *Boston* in *New England*, where, no person appearing to give security, or to answer the moiety the recaptors were entitled to for salvage, she was condemned and sold in the Court of Admiralty there: the recaptors had their moiety, and the overplus money remained in the hands of the officers of that court. An action upon the policy was brought at law by the defendant here, who obtained a verdict against the now plaintiff.

The plaintiff brought a bill, suggesting the capture to be fraudulent, and done designedly by the captain; and now moved for an injunction to stay the proceedings at law.

It was contended for the plaintiff, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loss, as the act of the 13 *Geo.* 2. c. 4. s. 18. gives the thing saved to the owner, and he is entitled to receive it from the officers of the Admiralty: and that the plaintiff ought to be obliged to pay no more than the loss actually sustained, which cannot be ascertained till after the defendant shall have received the part that might have come to him upon the salvage.

The defendant in his answer had sworn, that he had offered, and was now willing to relinquish his interest to the plaintiffs in the benefit of the salvage, and would give them a letter of attorney for that purpose to receive it.

Lord

Lord Chancellor *Hardwicke*. — "There is no ground for an injunction in this case; here there was an agreement to go to trial in one of these actions which had been brought, and to be bound by the event of that: at the time of the trial, they knew that the ship was retaken, and the manner of the capture. The *quantum* of the damage and loss sustained is the only thing now to be disputed; for it is impossible to carry on trade without insuring, especially in time of war. Therefore regard must be had to the insured, as well as to the insurer; and where there is no admission in the answer of any kind of fraud, though various pretences of that sort may be set up by the bill, they are not to be regarded. The question then arises on the statute of 13 *Geo.* 2. with regard to the salvage. It has been said, there ought to be only half the loss recovered on the policy; and as to that, the act has made great alteration in the law of nations with respect to recaptures. The carrying a ship *infra præsidia hostium*, or *si pernoctaverit* with the enemy, makes it the prize of the person retaking it, as if it had been originally the ship of the enemy: but by the act the recaption is the revesting of the property of the owner. If there is a salvage, that must be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it. The ship was condemned and sold, because the money was not paid, or secured to be paid by the owners. It is uncertain whether the defendant will receive any thing or not: and if any thing be recovered, he must have an allowance for his expences in recovering. Therefore I take it, when he is willing to relinquish his interest in the salvage, he ought to recover the whole money insured. It would be mischievous if it were otherwise, for then upon a recapture a man would be in a worse situation than if the ship were totally lost." Injunction was denied.

But the first case to be found in our books, in which the doctrine of abandonment was fully gone into, in which its principles were settled, and applied to the particular circumstances then before the Court, was the case of *Goss* and another against *Withers*.

It

Goss and another v. Withers, 2 Burr. 683.

It was a special case from the sittings in *London*, upon two actions, on two distinct policies of insurance; one upon a ship, and the other upon the loading.

The former was an insurance on the *David* and *Rebecca*, at and from *Newfoundland* to her port of discharge in *Portugal* or *Spain*, without the *Streights*, or *England*, to commence from the time of her beginning to load at *Newfoundland*, for either of the above-named places; and to continue till she should be arrived at her said port of discharge, and there moored 24 hours at anchor in safety. The ship was, by agreement, to be valued at the sum subscribed, without further account. The insurance was to be at ten guineas *per cent.*: and in case of loss to abate two *per cent.*: and in case of average loss not exceeding 5*l.* *per cent.* to allow nothing toward such loss. And if the vessel was discharged without the *Streights*, excepting the *Bay of Biscay*, two guineas *per cent.* were to be returned: and if she sailed with convoy and arrived, two guineas more *per cent.* were to be returned. The plaintiffs declared upon a total loss, by capture by the *French*.

The policy, declared upon in the other action, was an insurance upon any kind of lawful goods and merchandizes, loaden or to be loaden on board the aforesaid ship; and this policy for 7*l.* 7*s.* insured 70*l.* The declaration alleged, that divers quantities of fish and other lawful merchandizes, to the value of the money insured, were put on board, to be carried from *Newfoundland* to her port of destination, and so continued (except such as were thrown overboard as is after-mentioned) till the loss of the ship and goods. The declaration then avers, that a part of the said goods were necessarily thrown overboard in a storm, to preserve the ship and the rest of the cargo; after which jetson, the ship and the remainder of the goods were taken by the *French*.

The case states, that the ship departed from her proper port, and was taken by the *French* on the 23d of *December* 1756: and that the master, mates, and all the sailors, except an apprentice and landman, were taken out and carried to *France*:

France: that the ship remained in the hands of the enemy *eight days*, and was then retaken by a *British* privateer, and brought in on the 18th of *January* to *Milford Haven*, and that immediate notice was given by the insured to the insurer, with an offer to abandon the ship to their care. It was also proved at the trial, that before the taking by the enemy, a violent storm arose at sea, which first separated the ship from her convoy, and afterwards disabled her so far as to render her incapable of proceeding on her destined voyage without going into port to refit. It was also proved, that part of the cargo was thrown overboard in the storm: and the rest of it was spoiled while the ship lay at *Milford-Haven*, after the offer to abandon, and before she could be refitted: and the insured proved their interest in the ship and cargo, to the value insured.

Several questions arising upon the trial of the first of these causes, it was agreed that the jury should bring in their verdicts in both causes, for the plaintiffs, as for a total loss; subject, however, to the opinion of the court on the following questions, *viz.*

1st, Whether this capture of the ship by the enemy was or was not such a loss, as that the insurers became liable thereby?

2dly, Whether, under the several circumstances of this case, the insured had or had not a right to abandon the ship to the insurers, after she was carried into *Milford Haven?*

After two arguments, the Court decided unanimously in favour of the plaintiffs; and in the opinion then delivered by Lord *Mansfield*, all the law upon this subject was fully discussed. It will not be necessary, however, to state in this place what fell from His Lordship upon the first of these questions, thus submitted to the opinion of the Court; because that was very copiously treated of in a former chapter, in which it was shewn, that whether property was or was not transferred to the enemy by a capture, and absolutely lost to the original owner, it could no way affect the contract entered

Vide ante, c. 4. p. 108.

entered into between an insurer and insured. It will be sufficient then to follow His Lordship in the second part of his argument.

Lord *Mansfield*.—" The single question, therefore, upon which this case turns, is, whether the insured had, under all the circumstances, an election to abandon, on the 18th of *January* 1757? The loss and disability were in their nature total, at the time they happened. During eight days, the plaintiff was certainly entitled to be paid by the insurer, as for a total loss; and in case of a recapture, the insurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part: *half the value must be paid for salvage.* The disability to pursue the voyage still continued. The master and mariners were prisoners. The charter-party was dissolved. The freight (except in proportion to the goods saved) was lost. The ship was necessarily brought into an *English* port. What could be saved, might not be worth the expence necessarily attending it; which is proved by the plaintiff's offer to abandon. The subsequent title to restitution, arising from the recapture, at a great expence, the ship too being disabled from pursuing her voyage, cannot take away a right vested in the insured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved. I cannot find a single book, ancient or modern, which does not say, that in case of a ship being taken, tbe insured may demand as for a total loss, and abandon. What proves the proposition most strongly is, that by the general law he may abandon in the case merely of an arrest, or an embargo, by a prince not an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle. Every argument holds stronger in the case of the other policy with regard to the goods. The cargo was in its nature perishable, destined from *New-foundland* to *Spain* or *Portugal:* and the voyage was as absolutely defeated, as if the ship had been wrecked, and a third or fourth of the goods saved.

Vide the stat. 13 G. 2. c. 4. s. 18. now altered by 33 G. 3. c. 66. s. 42.

Vide ante, c. 4. p. 123.

" No

"No capture by the enemy can be so total a loss, as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be entitled; and by the late act of parliament, if an *English* ship retake at any time, before condemnation or after, the owner is entitled to restitution upon stated salvage. This chance does not suspend the demand, for a total loss, upon the insurer: but justice is done, by putting him in the place of the insured, in case of a recapture. In questions upon policies, the nature of the contract, as an indemnity, and nothing else, is always liberally considered. There might be circumstances, under which a capture would be but a small temporary hindrance to the voyage; perhaps none at all: as if a ship were taken, and, in a day or two, escaped entire, and pursued her voyage. There are circumstances, under which it would be deemed an average loss: if a ship taken be immediately ransomed, and pursue her voyage, there the money paid is an average loss. And in all cases, the insured may chuse not to abandon. In the second part of the "Usages and Customs of the Sea," (a *French* book translated into *English*,) a treatise is inserted called Le Guidon, in which, after mentioning the right to abandon upon a capture, he adds, "or any other such disturbance as defeats the voyage; or makes it not worth while, or worth the freight to pursue it;" I know that in late times the privilege of abandoning has been restrained, for fear of letting in frauds; and the merchant cannot elect to turn that, which, at the time it happened, was in its nature but a partial, into a total loss, by abandoning. But there is no danger of fraud in the present case. The loss was total at the time it happened: it continued total, as to the destruction of the voyage. A recovery of any thing could only be had, by paying more than half the value, including the costs. What could be saved of the goods might not be worth the freight for so much of the voyage as they had gone, when they were taken. The cargo, from its nature, must have been sold, where it was brought in. The loss, as to the ship, could not be estimated; nor the salvage of half be fixed by a better measure than a sale. In such a case, there is no colour to say, that the insured might not disentangle himself from unprofitable trouble and further expence, and leave the insurer to save what he could. It might

Vide ante, p. 230.

might as reasonably be argued, that if a ship sunk were weighed up again at great expence, the crew having perished, the insured could not abandon, nor the insurer be liable, because the body of the ship was saved. We are therefore of opinion, that the loss was total by the capture, and the right which the owner had, after the voyage was defeated, to obtain restitution of the ship and cargo, paying great salvage to the recaptor, might be abandoned to the insurers, after she was brought into *Milford-Haven.*"

The principles laid down in this case have been strictly adhered to in all similar cases; and particularly in one, which it will be proper to mention in this place, before we come to the great cause of *Hamilton* v. *Mendes*, in which some other principles relative to this subject were established.

Milles v. Fletcher, Dougl. 219.

It was an action on a policy of insurance, on the ship the *Hope* and her freight, from *Montserrat* to *London.* The plaintiff went for a total loss: the defendant insisted, that he was only entitled to recover for an average loss. The jury found a verdict for a total loss; and upon a motion for a new trial, the facts of the case appeared to be as follows:—The ship, when proceeding on her voyage, was captured on the 23d of *May*, by two *American* privateers, who took the captain and all the crew, and part of the cargo, which consisted of sugars, out of her. The rigging was also taken away. She was afterwards retaken, and carried into *New-York*, where the captain arrived on the 23d of *June*, and, taking possession of her, found that part of what had been left of the cargo was washed overboard, that fifty-seven hogsheads of what remained were damaged, and that the ship was leaky, and in such a state, that she could not be repaired without unloading her entirely. The owners had no storehouses at *New-York*, in which the sugars could have been put, while the ship was repairing, nor any agent there to advise or direct the captain. No sailors were to be had. The only method he had of paying the salvage, *which amounted to the value of forty hogsheads of sugar*, was by sale of part of the cargo, or the ship. The captain did not know of the insurance. If he had repaired the ship, his expences would have exceeded the freight more than 100*l.*

 There

There was an embargo on all vessels at *New-York* till the 27th of *December;* and by the destination of his ship, she was to have arrived at *London* in *July.* Under these circumstances, he consulted with his friends at *New-York*, and resolved, upon their opinion and his own, to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for, but the person who had agreed to buy her, ran away, and the captain left her in a creek near *New-York*, and returned to *England*, where he arrived in the *February* following, and gave the plaintiff notice of what had been done, which was the first information he received of it, and the plaintiff immediately claimed as for a total loss from the underwriters, and offered to abandon. Lord *Mansfield* told the jury, that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss, which they accordingly did.

Upon the motion for a new trial, the unanimous opinion of the Court was delivered by

Lord *Mansfield.* — "The great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be precisely known. I took great pains in delivering the opinion of the Court in the cases of *Goss* v. *Withers*, and *Hamilton* v. *Mendes.* I read both those cases over last night, and I think that from them, the whole law between insurers and insured, as to the consequences of capture and recapture, may be collected. Wherever a question of law arises at *nisi prius*, I propose a case, or grant one, when asked for by the counsel, and I avoid as much as possible blending fact and law together, having seen the inconvenience of it in *Pole* v. *Fitzgerald.* But on the trial of this Vide post.
cause, it did not appear to me, that there was any question of law, and no case was asked for. It was impossible to ask for one, till the facts were ascertained; and when they were, it would have been impossible to state them in any way, which could have left a doubt on the law. It was not contended, that a capture *necessarily* amounts to a total loss between insurer and insured; nor, on the other hand, that on a capture and

and recapture, there may not be a total loss, though there remain some material tangible part of the ship and cargo. Neither was it contended, that the captain has an arbitrary power, by his act, to make the loss, either partial or total, as he pleases. A great deal has been said about what the Admiralty could, or would have done, in such a case, in order to pay the salvage. As to that, if no owner appeared, they would condemn the whole; but if they saw, from the ship's papers, that there was one, they would not. If there were different claimants of the ship and cargo, they would leave it to them to say, what part should be sold; and if they differed in opinion, would order the sale of such part as would be attended with the smallest loss. But all *that* is foreign to the present question, which is singly this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage, or only a partial one, as in the case of *Hamilton* v. *Mendes*? In that case, and in *Goss* v. *Withers*, great stress was laid on the situation of the ship and cargo, at the time when the insured had notice, at the time of the offer to abandon, and at the time when the action was brought. No cases say, that the bare existence of the hull of the ship prevents the loss being total. The rule is laid down, "that if the voyage be lost, or not worth pursuing, "if the salvage be high, if farther expence be necessary, if "the insurer will not at all events undertake to pay that "expence, &c. the insured may abandon, notwithstanding "a recapture." Here, at the time of the capture, there were no hopes of a recovery; no friend's ship in sight; no means of resistance; all the crew were taken out, and part of the cargo; and the rigging also taken away. Afterwards the ship was retaken, and carried into *New-York*. When she was brought there, it still continued a total loss. Neither the insurers, nor the insured, had any agent in the place. The Court of Admiralty must have proceeded *secundùm æquum et bonum*, and might have sold her for the benefit of those concerned. When the insured first had notice, and offered to abandon, (which was when the captain came to *England*,) and when the action was brought, it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this is, that the loss was total indeed; but that the

captain made it so, by his improper conduct; for that on his taking possession of the ship, the loss became partial, and that he ought to have pursued the voyage. But is this defence true in fact? The captain, when he came to *New York*, had no express order; but he had an implied authority, from both sides, to do what was fit and right to be done, as none of them had agents in the place: and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity. Suppose there had been no insurance, what ought the captain to have done? 1st, As to the cargo, according to the course of the voyage, the ship should have arrived at *London* in *July*. On the capture, part had been taken out, some was washed overboard, 57 hogsheads were damaged, and the whole, from the leaking of the vessel, was in a perishable state. There were no storehouses; nor could the ship proceed in the state she was in. The crew were gone, and an embargo was laid on till *December*. What, shall a cargo, which was intended to arrive at *London* in *July*, be kept in a perishable state at *New York*, in a leaky vessel, till *December*? 2dly, As to the ship, it was certainly better to sell her, than to bring her to *London*. There was no crew belonging to her; and she had no cargo. Even if all the cargo had been left, the expences of repairs would have exceeded the freight. If she had been brought home, the expence of bringing her might have been more than what she would have sold for in *London*. It has been said, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy; for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The point is, what did the owner suffer by the capture; and it appears that he suffered so much, that it was not worth while to pursue the voyage. The whole voyage was lost. As the captain did not know of the insurance, he had no temptation to give the turn of the scale to one side or the other. I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found "*that it was*" in words, where would have been the question of law?"

The Court therefore discharged the rule for a new trial.

 It

It was necessary to be very particular in stating this case from the work of such an accurate reporter as Mr. *Douglas*, for two reasons: 1st, Because it is a determination, exactly conformable to that of *Goss* v. *Withers*, recognizing and confirming the principles there laid down; and 2dly, To relieve the Court from the observations made on account of the above decision. A case has appeared in print, under the name of *Milles* v. *Hayley*, upon the same policy, the same ship, and the same voyage: but the author of the work in which it appears, could not possibly have been present at the trial; and the facts must have been mistated to him: or if present, he has not taken down the evidence with sufficient accuracy. For he has not stated, that on the capture, part of the cargo, and also the rigging, were taken away: that part of what had been left of the cargo was washed overboard: that 57 hogsheads of the sugar that remained, were damaged: that the ship was leaky, and in such a state, that she could not be repaired without unloading her entirely: that the salvage amounted to the value of 40 hogsheads of sugar: that the repairs would have exceeded the freight by more than 100*l.*: and that the embargo was to continue till the 27th of *December*; whereas the ship ought to have arrived at *London* in the *July* preceding:—all which circumstances are to be found in Mr. *Douglas*'s report: all of them are material to the decision of the cause, and upon all of them much stress is laid by Lord *Mansfield*, in delivering the judgment of the Court. It was thought proper to note these differences, as nothing is so necessary in all cases, more especially in those of insurance, as the accurate and precise statement of circumstances.

Weskett on Insurance, p. 4.

But although the doctrine advanced in *Goss* v. *Withers*, was so very general and comprehensive: yet it certainly is not to be considered, as precluding the possibility of an exception to the generality of the principle there established.

Indeed, from the whole tenour of the Chief Justice's very learned argument upon that occasion, it is apparent, that he had at that very time an exception in his view: and from some of the words he then used, it would almost induce one to suppose, that His Lordship had foreseen the very case

which actually came to be decided within a few years afterwards.

It was a special case reserved at *Guildhall*, at the sittings there before Lord *Mansfield*, after *Michaelmas* Term 1760, in an action brought against the defendant, as one of the insurers, upon a policy of insurance from *Virginia* or *Maryland* to *London*, of a ship called the *Selby*, and of goods and merchandize therein, until she shall have moored at anchor 24 hours in good safety. The case stated for the opinion of the Court, was as follows:

Hamilton v. Mendes, 2 Burr. 1198. and 1 Blac. 276.

That the ship *Selby*, mentioned in the policy, being valued at 1,200*l.*; and the plaintiff having interest therein, caused the policy in question to be made; and the same was accordingly made, in the name of *John Mackintosh*, on behalf and for the use and benefit of the plaintiff, and was subscribed by the defendant, as stated, for 100*l.* That the ship was in good safety at *Virginia*, where she took on board 192 hogsheads of tobacco, to be delivered at *London*. That on the 28th day of *March*, she departed, and set sail from *Virginia* to *London*; and on the 6th day of *May* following, as she was sailing and proceeding in her said voyage, was taken by a *French* privateer called the *Aurora* of *Bayonne*. That at the time of the capture, the *Selby* had nine men on board; and the captain of the said privateer took out six, besides the captain, leaving only the mate and one man on board. That the *French* put a prize-master and several men on board the ship *Selby*, to carry her to *France*. That as the *French* were carrying her towards *France*, on the 23d day of the said *May*, she was retaken off *Bayonne* by an *English* man of war; and accordingly sent into *Plymouth*, where she arrived the 6th day of *June* following. That the plaintiff, living at *Hull*, as soon as he was informed what had befallen his ship, the *Selby*, wrote a letter on the 23d of *June* to his agent *John Mackintosh*, living in *London*, to acquaint the defendant, "that the plaintiff did "from thence abandon to him his interest in the said ship, as "to the said 100*l.* by the defendant insured." That the said *J. M.* on the 26th of *June*, acquainted the defendant with the offer to abandon the ship; to which the defendant answered, "that he did not think himself bound to take to the ship;

 "but

"but was ready to pay the salvage, and all other losses and "charges that the plaintiff sustained by the capture." That upon the 19th day of *August*, the ship *Selby* was brought into the port of *London*, by the order of the owners of the cargo, and the recaptors. That the ship *Selby* sustained no damage from the capture. That the whole cargo of the said ship was delivered to the freighters, at the port of *London*, who paid the freight to *Benjamin Vaughan*, without prejudice. The question, therefore, submitted to the opinion of the Court is, Whether the plaintiff, on the said 26th day of *June*, had a right to abandon, and has a right to recover, as for a total loss?

After two arguments at the bar upon this question, and after the Court had taken time to deliberate upon it, their unanimous resolution was delivered by the Chief Justice,

Lord *Mansfield*. — "The plaintiff has averred in his declaration, as the basis of his demand for a total loss, "that by "the capture, the ship became wholly lost to him." The general question is, Whether the plaintiff, who, at the time of his action brought, at the time of his offer to abandon, and at the time of his being first apprized of any accident having happened, had only, in truth, sustained a partial loss, ought to recover for a total one? In support of the affirmative, the counsel for the plaintiff insisted on the four following points: 1st, That by this capture, the property was changed; and therefore, the loss total for ever. 2dly, If the property were not changed, yet the capture was a total loss. 3dly, That when the ship was brought into *Plymouth*, particularly on the 26th day of *June*, the recovery was not such as, in truth, changed the totality of the loss into an average. 4thly, Supposing it did, yet, the loss having once been total, a right vested in the insured to recover the whole upon abandoning; of which right he could never be divested by any subsequent event.

"As to the first point. If the change of property were at all material between the insurer and insured, it would not be applicable to this case; because by the marine law of *England*, there is no change of property, in case of a capture, before condem-

condemnation; and now, by the act of parliament, the *jus postliminii* continues for ever. I know many writers argue, between the insurer and insured, from the distinction, whether the property was or was not changed by the capture, so as to transfer a complete right from the enemy to a recaptor, or neutral vendee, against the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor, or a vendee, ought never to be the rule of decision, as between the insurer and the insured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counsel for the plaintiff, upon this second point, that by this capture, while it continued, the ship was totally lost, though it be admitted, that the property, in the case of a recapture, never was changed, but returned to the former owner.

29 G. 2. c. 34. s. 24.

" The third point depends, as every question of this kind must, upon the particular circumstances. It does not necessarily follow that, because there is a recapture, therefore the loss ceases to be total. If the voyage be so defeated, as not to be worth the further pursuit; if the salvage be high, and the other expences great; or if the underwriter refuse to bear these expences, the insured may abandon. But in the present case, the voyage was so far from being lost, that it had only met with a short temporary obstruction; the ship and cargo were both entirely safe; the expence incurred did not amount to near half the value; and upon the 26th of *June*, when the ship was at *Plymouth*, and the offer was made to abandon, the insurer undertook to pay all charges and expences, to which the plaintiff might be put by the capture. The only argument to shew that the loss had not then ceased to be total, was built upon a mistaken supposition, that the recaptor had a right to demand a sale, and to put a stop to any further prosecution of the voyage. But that is not so. The property returned to the plaintiff, pledged to the recaptors for one-eighth of the value, as salvage for retaking and bringing the ship into an *English* port. Upon paying this, the owner was entitled to restitution. The recaptor had no right to sell the ship. If they differed about the value, the Court of Admiralty would have ordered a commission of appraisement. In this case, it was the interest of the owner of the ship, the owners

 of

of the cargo, and the recaptors, that she should forthwith proceed upon her voyage from *Plymouth* to *London*. But had the recaptor opposed it, or affected delay, the Court of Admiralty would have made an order for bringing her immediately to *London*, her port of delivery, upon reasonable terms. Therefore, it is most clear, that upon the 26th day of *June*, the ship had sustained no other loss, by reason of the capture, than a short temporary obstruction, and a charge which the defendant had offered to pay and satisfy. This brings the whole to the fourth and last point.

"The plaintiff's demand is for an indemnity. This action then must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided, that the damnification, in truth, is an average, or perhaps no loss at all. Whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been sustained. The reason is so much founded in sense, and the nature of the thing, that the common law of *England* adopts it, though inclined to strictness. The tenant is obliged to indemnify his lord from waste; but if the tenant do, or suffer waste to be done in houses, yet if he repair before any action brought, there lies no action of waste against him. He cannot however plead "*non fecit vastum*," but the special matter. The special matter shews, that the injury being repaired before the action brought, the plaintiff had no cause of action: and whatever takes away the cause, takes away the action. Suppose a surety sued to judgment; and afterwards, before an action is brought, the principal pays the debt and costs, and procures satisfaction to be acknowledged upon record: the surety can have no action for an indemnity, because he is indemnified before any action is brought. If the demand or cause of action does not subsist, at the time the action is brought, the having existed at any former time can be of no avail. But in the present case, the notion of the vested right in the plaintiff to sue as for a total loss, before the recapture, is fictitious only, and not founded in truth. For the insured is not obliged to abandon

Co. Litt. 53. a.

abandon in any case; he has an election. No right can vest as for a total loss, till he has made that election: he cannot elect, before advice is received of the loss; and if that advice shew the peril to be over, and the thing in safety, he cannot elect at all, because he has no right to abandon when the thing is safe. Writers upon maritime law are apt to embarrass general principles with the positive regulations of their own country: but they all seem to agree, that if the thing be recovered before the money is paid, the insured can only be entitled according to the final event." His Lordship here cited the passage from *Roccus*, which we have already seen at the beginning of this chapter, and then proceeded thus:

Roccus, Not. 50.

"In the case of *Spencer* v. *Franco*, though upon a wager policy, the loss was held not to be total, after the return of the ship *Prince Frederick* in safety; though she had been seized and long kept by the King of *Spain*, in a time of actual war. In the case of *Pole* v. *Fitzgerald*, though upon a wager policy, the majority of the Judges and the House of Lords held there was no total loss, the ship having been restored before the expiration of the four months, the time for which she was insured.

Vide ante, c. 4. p. 120.

Vide post.

"The present attempt is the first that ever was made, to charge the insurer as for a total loss, upon an interest policy, after the thing was recovered; and it is said, the judgment in the case of *Goss* v. *Withers* gave rise to it. It is admitted, that that case was no way similar. Before that action was brought, the whole ship and cargo were literally lost; at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely lost; the remainder of the cargo was fish perishing, and of no value at *Milford Haven*, where the ship was brought in; the ship so shattered, as to want great and expensive repairs; the salvage was one half, and the insurer did not engage to be at any expence: it did not appear that it was worth while to try to save any thing: and the recaptor, though entitled to one half, as well as the owner of the ship and cargo, left the whole to perish, rather than be at any further trouble or expence. But it is said, though the case was entirely different, some part of the reasoning warranted the proposition now inferred by the plaintiff

from it. The great principle relied upon was, "that as between the insurer and insured, the contract being an indemnity, the truth of the fact ought to be regarded; and therefore there might be a total loss by a capture, which could not operate as a change of property; and a recapture should not relate by fiction (like the *Roman jus postliminii*) as if the capture had never happened, unless the loss was in truth recovered." This reasoning proved *è converso*, that if the thing in truth were safe, no artificial reasoning shall be allowed to set up a total loss. The words quoted at the bar were certainly used, "that there is no book, ancient or modern, which does not say, that in case of the ship being taken, the insured may demand for a total loss, and abandon." But the proposition was applied to the subject-matter, and is certainly true, provided the capture, or the total loss occasioned thereby, continue to the time of abandoning, and bringing the action. The case then before the Court did not make it necessary to specify all the restrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was said to prevent any inference being drawn beyond the case then determined."

Vide ante, Goss v. Withers.

His Lordship, having read a great part of his former argument in that case, went on in this way:

"From this mode of reasoning, it did by no means follow, that if the ship and cargo had, by the recapture, been brought safe to the port of delivery, without having sustained any damage at all, that the insured might abandon. But without dwelling longer upon principles or authorities, the consequences of the present question are decisive. It is impossible that any man should desire to abandon in a case circumstanced like the present, but for one of two reasons, namely, either because he has overvalued, or because the market has fallen below the original price. The only reasons that can make it the interest of the party to desire, are conclusive against allowing it. It is unjust to turn the fall of the market upon the insurer, who has no concern in it, and could never gain by the rise. And an overvaluation is contrary to the general policy of the marine law; contrary to the spirit of the act of 19 *Geo.* 2.; a temptation to fraud, and a great abuse: therefore

fore no man should be allowed to avail himself of having overvalued. If the valuation be true, the plaintiff is indemnified, by being paid the charge he was put to by the capture. If he has overvalued, he will be a gainer, if he be permitted to abandon: and he can only desire it, because he has overvalued. This was avowed upon the first argument: and that very reason is conclusive against its being allowed. The insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss: and the insured ought never to gain more. Therefore, if there were occasion to resort to that argument, the consequence of the determination would alone be sufficient upon the present occasion. But upon principles, this action could not be maintained as for a total loss, if the question were to be judged by the strictest rules of common law: much less can it be supported for a total loss, as the question ought to be decided by the large principles of the marine law, according to the substantial intent of the contract, and the real truth of the case. If the question is to depend upon the fact, every man can judge of the nature of the loss before the money is paid. But if it is to depend upon speculative refinements, from the law of nations, or the *Roman jus postliminii* concerning the change or revesting of property, no wonder that merchants are in the dark, when doctors have differed upon the subject from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determination, I desire it may be understood, that the point here determined is, "that the plaintiff, upon a policy, can only recover an in-"demnity according to the nature of his case at the time of "the action brought, or (at most) at the time of his offer to "abandon." We give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon, and the action brought; or between the commencement of the action, and the verdict. And particularly I desire, that no inference may be drawn, "that in case the "ship or goods should be restored after the money paid as for "a total loss, the insurer could compel the insured to refund "the money, and to take the ship or goods;" that case is totally different from the present, and depends, throughout, upon different reasons and principles. Here the event had fixed the loss to be an average only, before the action brought; before

before the offer to abandon; and before the plaintiff had notice of any accident; consequently before he could make an election. We are therefore of opinion, that he cannot recover for a total, but for a partial loss only; the quantity of which has been estimated by the jury at ten pounds *per cent.*"

But although the Court did not choose unnecessarily to decide, whether, after payment as for a total loss, the underwriter could oblige the insured to refund, if it should afterwards prove to be but partial: yet in the year 1766 this very same question came before them. It arose in the case of *Da Costa* v. *Firth*, which was cited at large in a preceding chapter; and the Court held, that as there was a solemn abandonment, and the money was paid, and as there was also an agreement that the insurers should be content with such salvage as the sum insured bore to the whole interest, the insured should not be obliged to refund, but the insurer should stand in his place for the salvage.

Da Costa v. Firth, 4 Burr. 1966. Vide ante, c. 6. p. 198.

So also in the case of *Hamilton* v. *Mendes*, the fact of the capture and recapture having come to the knowledge of the assured at the same time, Lord *Mansfield*, in delivering the opinion, expressly reserves to the Court a clear right to decide, without being at all fettered by the case then in judgment, upon the point as a new one, *when the ship or goods insured should happen to be restored between the time of the offer to abandon, and the time of the action brought.* "For," said His Lordship, "we give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon, and the action brought: or between the commencement of the action, and the verdict." The former of these points, namely, the restoration of the property after an offer to abandon, upon the supposition of capture, and the time of bringing the action, came on lately for consideration, for the first time, in the following case: and as the judgment was very ably pronounced, I make no apology for giving it in detail.

Bainbridge and another v. Neilson, 10 East. p. 329.

It was an action on a policy of insurance on the ship called the *Mary*, valued at 6000*l.* at and from *Liverpool* to any port or ports in *Jamaica*, during her stay there, and from thence to

to her port of discharge in *Great Britain*, (the rest of the policy is not material.) There was another count upon a policy on freight valued at 4000*l.* upon the same voyage. At the trial, before Lord *Ellenborough*, the following facts were found. The ship sailed from *Jamaica* with a cargo and freight bound to *Liverpool*. On the 21st of *September* she was captured during her homeward voyage by an enemy. On the 25th day of the same month she was recaptured. On the 30th day of *September*, the plaintiffs received intelligence at *Liverpool* of the capture, but not of the recapture, and on the day following communicated the same to the underwriters, and gave notice of abandonment. On the 2d day of *October* intelligence of the capture was confirmed. On the 6th of *October*, five days after the notice of abandonment, the plaintiffs received the first intelligence of the recapture of the vessel, and that she then lay at *Loch Swilley* in *Ireland*, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered in their abandonment; but offered to do their best for the benefit of those who should ultimately be concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the plaintiffs have compromised with the recaptors; the vessel has been restored, and has arrived at *Liverpool*, being her port of discharge according to the terms of the policy, where she now is in safety. And the owners have also without prejudice received the freight of the goods on board her, and the proportion salvage and expences of such goods. The plaintiffs obtained the possession of the vessel at *Loch Swilley* under the said agreement, after the notice of abandonment, but before the action was brought; and the vessel did not arrive at *Liverpool* till after the commencement of the action. The ship was never taken into an enemy's port, nor did she sustain any damage, whilst in possession of the enemy. The amount of the salvage, damages, and charges upon the ship is 15*l.* 4*s.* 8*d.* and upon the freight, 13*l.* 11*s.* 5*d.* *per cent.* on the sum insured. The defendants paid to the plaintiffs before the commencement of this action 57*l.* 12*s.* 2*d.*, being the amount of their proportion of an average loss upon the two policies, which the plaintiffs accepted, without prejudice to their

This case has since received much confirmation in Parsons v. Scott, in C. P. 2 Taunt. 363. Everth v. Smith, 10 East, 278. and Falkner v. Ritchie, 2 M. & S. 290.

their claim of a total loss upon their abandonment. This case was fully argued at the bar, and then,

Lord *Ellenborough* said — " This case, though new in specie, is by no means new in principle: and though Lord *Mansfield*, in *Hamilton* v. *Mendes*, said, that he would not decide how the case would be, if the ship and goods were restored in safety between the offer to abandon, and the action brought; yet there can be no doubt what his decision would have been, if the facts of this case had been brought in judgment before him. The facts of the case are, &c. (here His Lordship stated the facts of the case as above related.) Now the question is, whether that, which in the result turns out to have been only a partial loss, and that to a trifling extent, shall, because of the notice of abandonment, which was given under the supposition at the time that it was a total loss, be now recovered against the underwriters as a total loss, after it is ascertained to be only a partial loss? To give effect to this claim would be grievously to enlarge the responsibility of underwriters, and to make them answerable not for the actual loss sustained by the assured, whom they have engaged to indemnify against the risks in the policy; but for a supposed total loss at the time of the notice to abandon, when that total loss, as it was supposed, had in fact ceased to exist. But it has been contended by the plaintiffs' counsel, that if the abandonment is once well made, a right of action thereby becomes vested, which cannot be devested by subsequent events. That proposition is not only not true in the whole, but is not true in any of its parts. The true effect of a notice of abandonment is only this, that if the offer to abandon turns out to have been properly made upon the supposed facts, which turn out to be true; the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was properly made upon facts supposed to exist at the time, if it turn out that circumstances existed, unknown to the parties, which did not entitle the assured to abandon. The notice would be properly given, upon intelligence received, and really credited by the assured, of the ship's being wrecked, whether that intelligence were true or not, and although the letter conveying the intelligence should turn out to be a forgery: and yet it is clear that no right of action would vest,

founded

founded upon such abandonment, thus made upon false intelligence, without any fact to support it. What is the notice of abandonment more than this: *that the assured, having had notice of circumstances, which entitle him, if true, to treat the adventure as a total loss, in contemplation of those existing circumstances, casts what is considered as a desperate risk on the underwriter?* But does not all that presume the existence of those facts, on which the right results to him of calling upon the underwriters to indemnify him? But if all this turns out to be a misconception; if, at the time, it had ceased to be a total loss, and no damage had happened; or if the only damnification arises out of the very act, which has saved the thing insured from total loss, namely, the salvage on the recapture, the whole foundation of the abandonment fails. It was then argued, that if the right of abandonment once vested, and was acted upon in time, it cannot afterwards be devested by subsequent intelligence of other circumstances and events: but the case of *Macarthy* v. *Abel* is an authority to the contrary: for there, though notice of abandonment were well given at the time, yet it was devested by subsequent circumstances, where it appeared that the cause of the abandonment had ceased to exist.

5 East p. 388. & post. in this chap.

"Next it is contended, that by the ship's being carried into a port of *Ireland* out of the course of her voyage, after her recapture the right of abandonment revived. I do not, however, understand, whether this is insisted upon as an entire and distinct cause of abandonment, or as connected with the capture and recapture. If it grew out of the recapture, let us see what Lord *Mansfield* says of it in *Hamilton* v. *Mendes*. "The third point depends, as every question of this kind "must, on the particular circumstances. It does not necessarily follow that, because there is a recapture, therefore "the loss ceases to be total. If the voyage be so defeated, "as not to be worth the further pursuit"— here no voyage is lost or defeated, for the voyage is performed. "If the salvage "be high"—here it is not so, but very trifling. "If the "other expence be great, and the underwriter refuse to bear "them"—here the expences are not great, and the actual loss has been paid by the underwriters into the hands of the assured.

assured. If, indeed, after the recapture, the ship had been carried into a port abroad, and the sale had become inevitable, because no person would indemnify the recaptors for their one-eighth salvage, that might have made it a total loss: but that is not the present case: and therefore none of the circumstances put by Lord *Mansfield*, which, after a recapture, might still make the loss total, exist in this case. I cannot, however, but consider, as at present advised, that the abandonment must be taken generally, as relating only to the actual state of things, at the time of the abandonment made; and if necessary to the decision of this case, I should wish to have that point fully considered. I am not disposed to enlarge the grounds of abandonment against underwriters — a privilege, which every one knows, has been much abused. In almost every case of a valued policy, it is the interest of the assured to abandon: and it therefore becomes the Court to watch every such case; and in no instance to enlarge that, which in its nature is only a partial, into a total loss. In *Macarthy* v. *Abel*, it might as well have been said, that having been once a total loss, it was to continue a total loss: but it was held otherwise, and that case is no otherwise distinguishable, except eventually *that* turned out to be no loss: and this is only a partial loss. But I can see no difference, whether it ceased, by subsequent events, to be a total loss altogether; or whether it was reduced by the events to so minute a loss as in the present case. Then, as in the case of *Godsal* v. *Boldero*, we look to the real nature of the contract in a policy of insurance: and there it was considered to be, as it is, a mere contract of indemnity. Therefore, though in that case, there was a total loss with respect to the subject-matter of the risk insured, yet circumstances having afterwards intervened, which adeemed the loss of the insured, he was held not to be entitled to recover. So here, as that which was supposed to be a total loss, at the time of the notice of abandonment first given, had ceased to be so, and in the event only a small loss has been incurred, that is the real amount of the damnification under this contract of indemnity; and that has been paid by the underwriters."

9 East, p. 72. & post. ch. 22.

The three other judges, *Grose*, *Le Blanc*, and *Bayley*, delivered

livered their opinions, concurring with His Lordship: and judgment was pronounced for the defendant. (*a*)

It has been already said, and from the preceding cases it seems to be a necessary inference, that in order to entitle the owner to abandon, there must, at some period or other of the voyage, have been a total loss; for he cannot be allowed to turn a partial into a total loss. There was, however, a modern case, in which this was the single piont to be determined.

It was an action on a policy of insurance upon the ship *Friendship*, from *Wyburgh* to *Lynn*, subscribed by the defendant for 100*l.* at two guineas *per cent.* The defendant pleaded a tender, and paid 48*l.* into court. The cause was tried at *Guildhall*, before Mr. Justice *Buller*, when a case was reserved for the opinion of the Court, stating that the *damages sustained by the ship in the voyage insured, did not exceed* 48*l. per cent.*, which sum the defendant had paid into court, upon pleading in the action. That when the ship arrived at the port of *Lynn* she was not worth repairing. The question for the opinion of the Court was, Whether the plaintiffs had a right to abandon?

Cazalet and others v. St. Barbe, 1 Term Rep. p. 187.

This case came on to be argued when Lord *Mansfield* was absent.

Mr. Justice *Willes.*—"The question is, Whether, under these circumstances, the plaintiffs had a right to abandon, or, in other words, Whether they can turn a partial into a total loss? The finding of the jury in this case determines the question, because it is expressly found that the damage did not exceed 48*l. per cent.* The case then states, that the ship was not worth repairing, but no mention is made of what

(*a*) In a *Scotch* Appeal before the House of Lords, upon a question of continuing to insist upon an abandonment previously made after hearing of the recapture, *Bainbridge* v. *Neilson* and *Falkner* v. *Ritchie* were quoted; upon the propriety of the decisions in which cases, the Lord Chancellor, though he expressed a wish for the attendance of the Judges, afterwards decided upon a collateral point, that the abandonment had been accepted by the underwriters; but protested against being considered as agreeing or not agreeing with those decisions.

Smith v. Robertson, 2 Dow. 474.

was

was her real worth; so that the remaining materials of the ship, if sold, may make up the difference between 48*l.* and 100*l. per cent.* There has been no loss either of the ship or of the voyage; but, being an old ship, she suffered so much that she was not worth repairing. I cannot now determine that there was a total loss, when the jury have already said that there was only a loss of 48*l. per cent.* As to the case cited of *Bond* v. *Hunter*, this question never occurred in it. The action was brought upon the homeward-bound policy, and it was sufficient to say, that that policy never attached, for the ship had received her death's wound in her outward-bound voyage. In the case of *Milles* v. *Fletcher*, a total end was put to the voyage. In the other cases, the questions arose upon losses which had happened during the several voyages; here the voyage has been performed, and the ship is arrived; and after the jury have found that the damage sustained did not amount to more than 48*l. per cent.* the Court are precluded from saying it is a total loss."

Vide supra

Mr. Justice *Ashhurst.* — "The facts found in this case preclude any question, Whether this can be construed to be a total loss? If the insurers should be held liable here, it would be making them insure the goodness of the ship; and if the owners can recover as for a total loss in this case, they might equally have recovered on account of the bad condition of the vessel, though she had not received much damage at sea. It is not stated that the ship received her death's wound in the course of her voyage. When she came into port, it was found she was not worth repairing; but *non constat* if she had not received any damage during the voyage, she would have been worth repairing. And though the vessel was not in a sound state, yet she had arrived in safety twenty-four hours; and the jury having exactly defined what degree of damage she had sustained, we cannot say that the plaintiff ought to recover any more."

Mr. Justice *Buller.* — "Nothing can be better established than that the owner of a ship can only abandon in case of a total loss. The cases which have been cited went upon that ground. In the case of *Jenkins* v. *Mackenzie*, though the ship was brought into port, yet the capture, as between the assurer

assurer and assured, was a total loss. But *there is no instance where the owner can abandon, unless at some period or other of the voyage there has been a total loss.* No such event has happened here; for the jury have expressly found, that the loss amounted only to 48*l. per cent.* Even allowing *total loss* to be a technical expression, yet the manner in which the plaintiff's counsel has stated it, is rather too broad. It has been said, that the insurance must be taken to be on the ship as well as on the voyage; but the true way of considering it is this: *it is an insurance on the ship for the voyage.* If either the ship, or the voyage be lost, that is a total loss; but here neither is lost. The case of *Hamilton* v. *Mendes* is decisive. Judgment for the defendant. Vide supra.

In another case, an action was brought on a policy of insurance on the *Prince of Wales,* in port or at sea, for six months, from the 18th *July* 1777. The ship in question was in government-service, bound from *Cork* to *Quebec.* She arrived there, but the season being too far advanced before she was ready to return, she was removed into the bason: but, on the 19th *November,* she was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ship could not be examined till *April* following, after the expiration of the policy. She was then, however, found to be bulged and much injured, but not thought irreparably so. In the progress of the repair, difficulties arose for want of materials; and the captain, after consulting the merchants and agents in the country, sold her. An account was made up, charging the insurers with the whole amount, and crediting them with the sums for which the ship sold, as salvage.

Furneaux v. Bradley, Easter, 20 G.

Lord *Mansfield,* at the trial said:—"The great point in the cause is, Whether this is a total loss by this accident? It is a new question: upon which I shall reserve a case for the opinion of the Court." After argument by counsel on both sides, His Lordship said, the justice of the case seemed to be, that the loss in *November* should be taken as an *average,* not a *total* one; and that the whole Court were of opinion, that

that the ship should be considered as damaged on the 19th of *November*, but not *totally lost*.

M'Masters v. Shoolbred, Sitt. at G. H after Mich. 15 G. 3. 1 Espinasse's Cases at N. P. 237. S. C.

In a subsequent case before Lord *Kenyon*, at *Nisi Prius*, it was held in an action on a policy for *six months*, where the ship had been captured and carried into *Charlestown*, sold by the captors, by authority of the *French* consul there, and purchased by the captain for account of the original owners, that this was only to be considered as a partial loss, and that the owners could not abandon, Lord *Kenyon* being of opinion that the captain was agent for the owners, recovering the vessel upon their account, and paying a kind of salvage, the amount of which would be the loss sustained, and which only constituted an average loss. His Lordship, however, admitted, that when the ship had been captured and carried into port in the enemy's possession, the assured at that period might have abandoned. But not having done so till the vessel was recovered, they could now only go for an average loss.

Wilson v. Foster, 1 Marsh. 425. & 6 Taunt. 25.

A similar decision to the above was made in the Common Pleas, where the captain, as agent of the owners, had purchased the ship sold under a seizure and condemnation by the *Prussian* government.

When the case of *M'Masters* v. *Shoolbred* was before the Court at *Nisi Prius*, it did not occur to the counsel for the defendant to object, that the act of the *French* consul was illegal, and contrary to the law of nations: and consequently that the money paid by the original owners, there being no sentence of condemnation, was in the nature of a ransom: and that ransoms being positively prohibited by the statutes of 22 *G.* 3. c 25. and 33 *G.* 3. c. 66. s. 37, 38, & 39., the money paid by an assured for the ransom could not be a charge upon the underwriter. But in a subsequent case, where this objection was taken, and a case reserved upon it for the opinion of the Court, the whole Court, after two arguments, were unanimously of opinion that the objection was well founded; that money paid by an assured under those circumstances was a ransom; and consequently could not be recovered from the underwriters.

Havelock v. Rockwood, 8 TermRep. p. 268. See ante, p. 112. and post. ch. 18.

These

These cases, and the judgments upon them, have been cited at length, because the principles of abandonment are so clearly and accurately defined, and are so aptly illustrated by referring them to the particular circumstances arising in those causes, that it would be absurd to insist more upon the subject, as the reader must from them be able to collect every thing relating to abandonment. Nor let it be objected, that those were almost all cases of abandonment after a capture; for many of the rules there laid down were general in their nature, comprehending cases of wreck and detention, *mutatis mutandis*, as well as those of capture. This will be best explained by putting two possible cases.

Suppose a neutral ship is arrested, and detained by a foreign prince by an embargo, the owner immediately, upon hearing of this accident, would have a right to abandon; because no man is bound to wait the event of an embargo. But if the same ship that brings an account of the embargo, should also inform him, that the embargo was taken off, that the ship had only been detained two or three days, that very trifling or no damage had arisen, then it is impossible to say that the merchant may abandon; because, as we have seen, it is a principle of good sense, that a man cannot make his election, whether he will abandon or not, till he receive advice of the loss; and if by the same conveyance it appear that the peril is over, and the thing insured is in safety, he has lost his election entirely; because he has, and can have no right to abandon when his property is safe.

2 Burr. 696.

2 Burr. 1211.

The same principle governs in the case of wreck: for let us suppose a trunk of bullion, as in the case of *Da Costa* v. *Firth*, to be the property insured; and that, the ship being wrecked, this trunk of course goes to the bottom: the owner would instantly be entitled to abandon to the underwriter, and to call upon him to contribute as in case of a total loss. But if it should so happen, that before the action was brought, or before the offer was made to abandon, the bullion should be recovered, and restored to the owner at the place of destination, upon paying a moderate salvage; in that case it would fall within the rule of *Hamilton* v. *Mendes*; and the assured would only be entitled to recover an indemnity, according to

4 Burr. 1966.

 the

the nature of his case at the time when the action was brought; consequently he would not be allowed to abandon.

Manning v. Newnham, Trin. Term 22 G. 3.

But it has been settled also by a solemn decision of the Court of King's Bench, in what cases a loss shall be deemed to be total, after an accident by perils of the sea. A policy was effected in *London* upon the *ship Grace*, her "*cargo* and "*freight*, at and from *Tortola* to *London*, warranted to de-" part on or before the first of *August* 1781. The ship valued " at 2,470*l.*, the freight at 2,250*l.*, and the cargo at 12,400*l.* " At a premium of 25 guineas *per cent.* to return 10 *per cent.* " if she depart the *West Indies* with convoy for *England* and " arrives." At the head of the subscriptions is the following declaration, *viz. on ship, freight, and goods, warranted free of particular average.* This ship, with her cargo, was a *Dutch* prize taken by a privateer of *Tortola*, and was there condemned: during the whole of her stay at *Tortola*, (four or five months,) she was never unloaded. On the first of *August* the whole fleet of merchantmen got under way, under the convoy of the *Cyclops*, *&c.*, but not being able to get clear of the islands that day, they cast anchor during the night, and the next day got clear of the islands. About 10 o'clock on the 2d of *August*, several squalls of wind arose, which occasioned the ship to strain and make water so fast, that the crew were obliged to work both pumps; and, on the third, the captain made a signal of distress: in consequence of which she was obliged to return to *Tortola*, under protection of one of His Majesty's ships. The captain made his protest, and a survey was had, by which the ship was declared unable to proceed to sea with her cargo, and that she could not be repaired in any of the *English* islands in the *West Indies*: and that many of the sugars in the bilge and lower tier were washed out, and several of the casks broke and in bad order. The ship and the whole of the cargo were sold accordingly at *Tortola*. The assured claim a total loss of ship, cargo, and freight, which the jury thought right, and found accordingly. A motion was made for a new trial, which upon full consideration was refused.

See also Wilson v. Royal Exch.

Lord *Mansfield*, after stating the evidence, and that his prejudices at the trial were in favour of the underwriters, proceeded

ceeded thus: — "But notwithstanding this inclination of my opinion, upon full consideration we think the jury have done right. If by a peril insured the voyage is lost, it is a total loss; otherwise not. In this case the ship has an irreparable hurt within the policy; this drives her back to *Tortola*, and there is no ship to be had there which could take the whole cargo on board. There were only two ships at *Tortola*, and both could not take in the cargo. To shew how completely the voyage was lost, and that no ship could be got, the assured have not been able to send that part of the goods which they purchased forward to *London*. It is admitted there was a total loss on the freight, because the ship could not perform the voyage. The same argument applies to the ship and cargo. It is a contract of indemnity; and the insurance is that the ship shall come to *London*. Upon turning it in every view, we are of opinion that the voyage was totally lost, and that is the ground of our determination." The rule was discharged. Assurance, 2 Camp. 623.

This subject of late years has been much considered and discussed; and the case of *Manning* v. *Newnham*, though not overturned, has received a considerable shake. In *Anderson* v. *Wallis*, 2 *M. & S.* 240., it was held that a *mere retardation of a voyage*, where the insurance was on a cargo not of a perishable nature, to another region, (the voyage being to *Quebec*,) was not a ground of abandonment.

Where a *neutral* ship bound from *America* to *Havre* was detained and brought into a *British* port for the purpose of search; and pending proceedings in the Admiralty, the King of *Great Britain* declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held *to be a total loss of the voyage*, which would entitle the *neutral assured to abandon*, and to recover as for a total loss. But not having given notice of abandonment in due time, he could only recover for a partial loss. Barker v. Blakes, 9 East, 283. See for another point this case at the end of this chap. and also at the end of chap. 12. on illegal voyages.

But in all the cases lately quoted and commented upon, it will be seen, that to justify an abandonment, the loss must be occasioned by one of the perils in the policy, and therefore although a loss by wreck or *capture*, *by an arrest or detention*

 of

of princes, is perfectly understood in the law of *England*; yet it has been held not to be a loss within the policy, for which the assured can abandon, and recover as for a total loss of cargo, that the port of destination has been shut by order of the enemy against ships of the nation to which the ship insured belongs, although the cargo was fish, and although it was obliged to be sold at another port for a very small price. As this is one of the leading cases upon the subject, I shall lay it before the reader the more largely on that account.

Hadkinson v. Robinson, 3 Bos. & Pull. 388.

It was an action on a policy of insurance on *pilchards*, on board the *Paxaro*, at and from *Mount's Bay*, in *Cornwall*, to *Naples*, with leave to join the convoy at *Naples* or elsewhere. The policy contained the usual memorandum, exempting the underwriter from average losses on *fish*, *&c.* unless general, or the ship be stranded. The declaration stated the loss to be, "that after the loading of the said *pilchards* on board, *&c.* the "said ship or vessel with the pilchards, *&c. &c.* departed and "set sail from the said port of *Penzance* aforesaid, on her "said intended voyage in the said writing and policy of in-"surance mentioned, and afterwards, and whilst the said "ship was so sailing and proceeding on her said voyage, and "before her arrival at *Naples*, to wit, on, *&c.* the port of "*Naples* aforesaid, was, by the persons exercising the powers "of government in the kingdom of *Naples* shut against all "ships the property of any of the subjects of our Lord the "King, or sailing under the colours of our Lord the King, "and against all merchandize, the property of any such sub-"jects, carried in such ships, under the pain of such ships "and merchandize being confiscated by the persons exer-cising the powers of government in the kingdom of *Naples*, whereby the said ship, with the said pilchards on board, (the said ship being then and there the property of subjects "of our Lord the now King, and sailing under the colours of "our Lord the now King, and the pilchards being then and "there the property of the plaintiff, who was then and there "a subject of our Lord the now King,) was then and there "prevented from pursuing her voyage to *Naples* aforesaid, "and the voyage was thereby then and there wholly defeated "and lost, and the pilchards then and there became of no "value to the plaintiff." At the trial before Lord *Alvanley*

it appeared, amongst the other facts, that after this vessel sailed from *Lisbon*, in the prosecution of her voyage, she received intelligence that *English* vessels were excluded from all the ports of *Naples*; and that afterwards the commander of the convoy ordered, that all vessels destined for *Naples* or *Sicily* were to proceed to *Port Mahon*, where the report respecting the state of the ports of *Naples* was confirmed. That in consequence of this a survey of the cargo was taken, under the direction of the Vice-Admiralty Court of *Minorca*, and sold there for a small sum of money. The assured abandoned to the underwriters, who refused to accept it. The jury found a verdict for the underwriters, to set aside which a motion was made in the following term. After argument at the bar and time taken to deliberate,

Lord *Alvanley* delivered the judgment of the Court, confirming the verdict of the jury. His Lordship said,—"The question is, Whether the circumstances, which have happened, amount to a total loss within the policy? The policy includes capture and detention of princes; and any loss, which necessarily arises from such acts, is a loss within the policy. But it has appeared to me, that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination, the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the destruction of the thing insured. If they could, the same principle would have applied in case information had been received at *Falmouth*, that the ship could not safely proceed to *Naples*. In *Goss* v. *Withers*, *Hamilton* v. *Mendes*, and *Milles* v. *Fletcher*, the principles, by which a total loss is to be ascertained, are clearly laid down. It is there said, "That if the voyage be lost, or "not worth pursuing, if the salvage be high, if further ex-"pence be necessary, if the insurer will not at all events un-"dertake to bear that expence, *&c.* the insured may abandon, "notwithstanding a recapture." But the doctrine thus laid down is only applicable to cases in which the loss is occasioned by a peril insured against, which, as it appears to me, must be a peril acting upon the subject immediately, and not circuitously, as in the present case. Without entering, there-

fore, into the question which has arisen in another case, (see *Dyson* v. *Rowcroft*, *ante*, p. 183.) I think that the detention of the cargo on board the ship in a neutral port, in consequence of the danger of entering the port of destination, cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against. This is an insurance upon an article from *England* to *Naples*, warranted free from particular average. The plaintiff, therefore, cannot recover, unless the article be totally lost by a peril within the policy, and such peril must, as I think, act directly and not collaterally upon the thing insured. I much doubt, whether, if a verdict had been found for the plaintiff, judgment might not have been arrested. With respect to the case of *Manning* v. *Newnham* it may be observed, that Lord *Mansfield* expressly decides it upon the ground of the voyage being lost by one of the perils insured against, namely, by tempestuous weather. The words of Lord *Kenyon* in the case of *M'Andrews* v. *Vaughan*, in which he lays down that the insured may recover for a total loss, if the voyage be lost, must be taken with reference to the case before him, in which the injury arose from capture. The case of *Cocking* v. *Fraser*, (*ante*, 181.) is an extremely strong authority to shew, that if the article insured (being one of those mentioned in the memorandum) remain in specie, the assured cannot recover, though it be rendered totally useless, and never reach the port of destination. But that case did not involve the question on which this case turns, namely, whether the loss was occasioned by a risk within the policy. Here, without entering into the question how far the cargo was totally lost, the claim made by the assured arises from the ship not proceeding to that port to which she was destined. Had she proceeded to *Naples*, the loss insured against might have arisen. If we were to decide that the sale at *Port Mahon* was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum, the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and by giving notice of abandonment to throw a loss upon the underwriters, to which they are not liable by the terms of the policy. We are of opinion the verdict was right."

A similar case, except that the cargo was not of a perishable nature, came before Lord *Ellenborough*, who said, that if such a loss, as the shutting a port against vessels of the nation to which the ship belongs, was allowed, every ship about to sail from the port of *London* for a port which had fallen into the hands of the *French*, might be abandoned. The plaintiff being nonsuited upon another ground, it never came again before the Court.

Lubbock v. Rowcroft, 5 Esp. R. 50.

The following cases received judicial determinations agreeably to the same principle: first, in a case of an insurance on goods on board the ship *Laurel*, at and from *Bristol to Monte Video, and any other port or ports in the river Plate, in possession of the English.* Loss by perils of the sea. When the ship arrived, *Monte Video*, and every other port in the river *Plate*, except *Maldonado*, was in the hands of the enemy, and the commander of *Maldonado*, for prudential reasons, would not suffer her to enter there. The vessel therefore bore away for *Rio Janeiro*, being the nearest friendly port, and in the course of that voyage sustained damage by perils of the sea.

Parkin v. Tunno, 11 East, 22. 2 Camph. 59.

Lord *Ellenborough* at the trial, and the rest of the Court, upon a motion to set aside a nonsuit which His Lordship had directed, were of opinion, that as the policy contained a contract for a specific voyage, it could not be extended by implication to cover the ship in her voyage to *Rio Janeiro*, notwithstanding the circumstances which had occurred to induce the necessity of it.

And secondly, in a case of a ship insured from *Hull* to *St. Petersburgh*, having sailed under convoy to the *Sound*, and was afterwards stopped in her course by a king's ship for eleven days, from an apprehension of hostilities. She then proceeded to a place of rendezvous for convoy, and proceeded under it, till they heard that a hostile embargo was laid on all *British* ships at *St. Petersburgh*, and the vessel returned to *Hull*. The Court held that this was not a loss by arrest or detention of kings, *&c.*, but attributable merely to the fear of the hostile embargo in the port of destination, and therefore not a loss within the policy. Lord *Ellenborough* expressly

Forster v. Christie, 11 East, 205.

expressly founded himself on the authority of *Hadkinson* v. *Robinson*, (ante, p. 262.)

Blancken-hagen v. London Assurance Co. Sittings bef. Mich. 1808, 1 Campb. 454.

A decision upon similar principles was made by Lord *Ellenborough* in the following case. The insurance was on goods on the ship *William*, at and from *London* to *Revel*. The ship sailed from the *Nore* under convoy of the *Forrester* sloop of war, for the *Sound*, and arrived there on the 27th of *October* 1807. The ship proceeded from thence towards *Revel*, on the 15th of *November*, under convoy of the *Garnett* sloop of war. On the 17th of *November*, whilst the ship was proceeding on her voyage with the convoy, it became known to the convoy, that an embargo was laid on all *British* ships in *Russian* ports; and in consequence thereof the ship, under the orders of the convoy, returned to *Copenhagen* roads on the 18th of the same month. The ship *William*, together with the convoy, afterwards proceeded to lay off *Gottenburgh*, a *Swedish* port, for six days; and the ship insured might have gone into that port, if the captain had so thought fit, *Sweden* being then at war with *Russia*, but in amity with this kingdom. The ship sailed from off *Gottenburgh* the 30th of *November* 1807, with the *Garnett* and fleet for *England*, with the additional convoy of the *Spitfire* sloop of war. The ship *William* was last seen on the 3d of *December* 1807, distant ten leagues from the *Naze* of *Norway*, when the sea ran high, and not having been since heard of, she was admitted to be lost. Hostilities between this country and *Russia* commenced on the 18th of *December*, and between this country and *Denmark* in the preceding *September*.

Lord *Ellenborough* told the jury that this was a contract for the voyage out, and that although a ship *from necessity* might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same. That *such a necessity* might perhaps even justify a return to *England*, if it could be proved satisfactorily, that it was the intention of the parties to seize the first favourable opportunity of returning to *Revel*. No such evidence appears in the present case. Neither does it appear that the convoy compelled the return to *England*: for although the first part of the case states that the return to *Copenhagen* roads was *under the orders of convoy*, the

return

return to *England* is not averred to be under such compulsion, I must therefore take this to be a voluntary abandonment of the voyage. And at all events, even if there had been an intention to return to *Revel*, war intervened before such an intention could be executed, and that would put an end to the contract. The plaintiff was nonsuited.

Another action was brought in the Common Pleas on this policy, and Sir *James Mansfield*, then Chief Justice, concurred with Lord *Ellenborough*; and his judgment was afterwards confirmed by the whole Court. And where a ship was insured to her *last port of discharge*, in the river *Plate*, and the master hearing that *Buenos Ayres*, where he meant to discharge his cargo, was in the hands of the enemy, went to *Monte Video*, and began to discharge the cargo there, *this* was held to be her *last* port of discharge, and therefore the underwriters were not liable for a loss after the vessel had been moored 24 hours.

Brown v Vigne, 12 East, 283.

In the beginning of this chapter, in stating the nature of an abandonment, the effect of it was necessarily explained: namely, that when the assured claimed a total loss, he must cede or abandon whatever is saved, or whatever may be recovered, to the underwriter, and who, when the transfer is made to him, stands in the place of the assured, and thus, by the transfer, becoming entitled to all the benefit and advantage which the assured himself could have claimed, if his property had been uninsured. But the very peculiar circumstances, which in many cases occurred during the two last wars, have led to a variety of discussions upon this subject. Amongst others, the late Emperor (*Paul*) of *Russia* having in the month of *November* 1800 laid an embargo on all *British* shipping then in the *Russian* ports, most of which, being then laden for their homeward voyage, he compelled to unload, and having again taken off the embargo in *May* 1801, and allowed the same cargo to be reloaded, and sent to *England*, a considerable question arose between the two sets of underwriters on ships and freight. The owners had often insured the *ships* with one set of underwriters, the *freight* with another; and in *February* 1801, when the news of this embargo reached *England*, losses to a considerable amount were paid, the assured

sured abandoning the *ships* to the underwriters *on ships*, the *freight* to the underwriters on *freight*. But afterwards, when the embargo was taken off, when the ships arrived, and the freights were earned and paid to the owners, the question was, whether the abandonment of the ship conveyed to the *insurer on ship* the freight she had earned; or whether it went to the *underwriter on freight*, to whom also an abandonment had been made.

In *France*, no difficulty could well arise upon such a subject; because insurances on ship and freight are not known as distinct subjects of insurance. But that not being the case in *England*, and the question being of considerable difficulty, and, in point of value, of great magnitude, it has been the subject of much discussion. A learned author has stated it as clear, "that the abandonment of the ship in *England* does "not transfer the freight she has earned." But it consists with my own professional knowledge to state, that that opinion was far from being universal; and that there never was a question of insurance law, in my memory, on which a greater contrariety of opinion obtained at the *English* bar. Where such a difference did prevail, it was likely that the case should be brought before the Court; and the course adopted by the learned Judges shews how difficult a question it appeared to them to be: for I think, upon a review of the following cases, it will appear, that they have always been decided upon collateral grounds, applicable to each particular case; and have always left the rights of the two sets of underwriters undisposed of. But I am bound to acknowledge, that, as far as the opinion of the Court could at all be collected, the inclination seemed to be against the claim of the underwriter on freight, as between him and the underwriter on ship. I therefore do not presume to hazard an opinion, where in such judgments the question is so difficult.

2 Emerigon, 221.

2 Marshall, 1st edit. 520.

Thompson v. Rowcroft, 4 East, 34.

The first in order came before the Court of King's Bench, in an action by the underwriter on freight against the owner of the ship. His declaration stated, that the defendant was owner of three-fourths of the ship *Theseus*, which had been chartered by him to one *Sanders*, to proceed to *Riga* for a quantity of masts, and to return therewith to *Portsmouth*, for which

which certain freight was to be paid. That the defendant caused the freight to be insured, and that the plaintiff subscribed the policy for 150*l.* That the ship arrived at *Riga*, was there loaded, and had nearly completed her cargo, when, in *Nov.* 1800, *the ship was arrested, restrained, and detained* by the *Russian* government, at *Riga*, and the cargo was unladen and kept under the authority of the same government; and that, on the 11th *Feb.* 1801, upon intelligence of the loss arriving in *London*, the defendant applied to the plaintiff, and the other underwriters on freight, requiring them to pay a total loss, *and abandoning to them their interest in the freight insured.* The declaration then stated, that, in consideration of the premises, and that such payment of the loss should be made within one month, defendant promised, on such payment being made, *to assign all right of recovery and compensation of and in the freight* to one *W. D.* and the plaintiff, in proper form, for the benefit of the underwriters. That payment of the loss was duly made to the defendant: that afterwards, in *May* 1801, the arrest, &c. of the said ship was withdrawn by the *Russian* government, and the ship and cargo liberated, and the cargo put on board the ship, and the said ship proceeded to *Portsmouth*, and delivered her cargo to *S. Sanders*; and the defendant thereupon received the freight of the same to the amount of 1857*l.* and that the plaintiff's interest therein was 150*l.*, yet that the defendant had not made any assignment for the benefit of the underwriters on freight. The cause was tried before Lord *Ellenborough*, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case, which stated the preceding facts, and also that the ship had been insured; and that, on hearing of what had passed in *Russia*, the respective underwriters paid their total losses, and the following indorsements were made on the policies. That on the ship was in these words: "Agreed to settle a total loss of 100*l. per cent.* the ship being "detained and seized at *Riga*, and the owners to account, to "the underwriters, for the ship, if restored to, or received "by them, or to make, at the expence of the underwriters, a "proper assignment of their interest, in proportion to the "sums insured. *London*, 19th *January*, 1801." And on that *on the freight*, "the interest in the freight insured by this "policy being abandoned to the underwriters, as far as their "sub-

"subscriptions on the same, and payment of the loss being "agreed to be made in one month, as customary, it is agreed, "on such payment being made, to assign all right of re-"covery, compensation, *&c.* to *H. T.*, *W. D.*, and *T. R.*, for "the benefit of," *&c.* And the defendant signed the following agreement: "In consideration of the underwriters having "accepted an abandonment of the ship *Theseus*, &c. and "having agreed to pay a total loss thereon, I do hereby pro-"mise, on payment of the same, to make over to them or "their assigns, at their expence, an assignment, in a reason-"able and proper form, of their interest and proportion of "the same. *Thomas Rowcroft.*" No assignment has been executed either of ship or freight. The defendant has received the freight, and has been called upon by the plaintiff to make an assignment for his benefit according to the above-mentioned indorsement on the policy on freight: but the underwriters *on the ship* insist that they are entitled to the freight, and have given the defendant notice of such claim; and he therefore does not think himself justified in paying the plaintiff without the sanction of the Court.

It is observable from this statement that the intention of the parties here was to procure a decision of the Court upon the general question, whether the underwriters on ship or freight were entitled to what may be deemed the salvage *on the freight:* and it was so considered at the bar on the first argument, treating the defendant as a mere stakeholder, and the question as being in truth between the underwriters *on the ship* and those *on the freight.* But at the recommendation of the Court, the second argument was narrowed to the consideration of the question upon the specific agreement between the plaintiff and the defendant: and on this ground alone the case was ultimately decided. The defendant's counsel were of course to contend as to the general question, that the underwriters on ship were entitled to the earnings of the ship: but

Lord *Ellenborough* said,—"If the rights of the respective sets of underwriters on the ships and on the freight clashed in this case, and if it had been a question of priority between the two, who were litigating for payment out of the same fund, I should

should have gone with the defendant's counsel in a great part of their argument; but here the litigation is by one of the sets of underwriters with the assured, who has made a specific contract with each of them, by which he must be bound. And therefore, in my present view of the subject, the right of property in the subject-matter may be in the underwriters on the ship, and yet the defendant may be liable to the underwriter on the freight in this action. The plaintiff contracted with the defendant to insure his freight; an event happened which entitled him to abandon it to the plaintiff: the plaintiff accepted the abandonment, and has paid the defendant as for a total loss of the freight. The defendant has since received the freight; and yet he refuses to pay it over to the plaintiff in pursuance of his undertaking. To be sure he is liable." Judgment for the plaintiff.

Leatham, Executor, v. Terry, 3 Bos. & Pull. 479.

In the very same term (*Trinity*, the 43d *Geo.* 3.) a special case, the facts of which were substantially the same, received a similar decision. The declaration in that case was merely for money had and received to the use of the plaintiff's testator, who had been an underwriter on freight of the ship *Manchester*. The Court took time to consider of the point, and then Lord *Alvanley* said,—"We have enquired into the circumstances of the case lately decided (*Thompson* v. *Rowcroft*) in the King's Bench, upon the same subject, and find they do not materially differ from the present. Here the assured, in consideration of being paid for a total loss upon the ship, agreed to assign over all their right and interest in the ship: after which they agreed with the underwriters on freight, in consideration of being paid a total loss of the freight, to assign over to them, "*all their right and title* to all future benefit that might occur thereafter, except as insurers therein." The ship having arrived and earned freight, the defendants, who are the assured, received the whole, as if they had never abandoned: and the question now is, whether, in an action for money had and received to their use, the underwriters or freighters are not entitled to demand what the assured have received? The Court of King's Bench, in deciding the case before them, were of opinion, that the assured had bound themselves to account to the underwriters on freight for all the freight they might receive: but in giving judgment

judgment they expressly declared, *that they did not intend to decide the question between the underwriters on the ship and the underwriters on the freight. We shall take the same course; and though the case has been argued as if it were a question between the two sets of underwriters, we desire not to be understood as giving an opinion upon such a case.* We only determine that the defendants have made themselves responsible to the plaintiffs, in this form of action, for the freight which they have received." Judgment for the plaintiffs.

In the next case which came before the Court, the general question could hardly fail to be discussed, especially as the Court itself, at the close of the first argument, desired that the second might be confined to the consideration of the effect of an abandonment of a ship upon the right to the accruing freight.

M'Carthy and others v. Abel, 5 East's R. 388.

It was an action brought on a policy of insurance *on freight* of the ship *Thomas*, upon a voyage at and from *Riga* to *Chatham*, &c. At the trial before Lord *Ellenborough*, a verdict was found for the plaintiffs for 200*l.* subject to the opinion of the Court on the following case. That the plaintiffs, being owners of the ship, chartered her to *Thorntons* and *Smalley*, for the voyage insured, for which freight was to be paid in certain proportions (restraints of princes and rulers during the voyage excepted). On the ship's arrival at *Riga*, she was supplied with a cargo, and nearly the whole thereof had been taken on board, when an embargo (*November* 1800) was laid on all the *British* shipping in the port of *Riga*. The case then states the relanding of the cargo, the abandonment to the underwriters *on freight* on the 11th *January* 1801, *of their interest in the freight*, and demanded a total loss. And on the same day they *abandoned the ship to the underwriters on ship*. The case further states the restoration of the ship by *Russia*, the reloading of the ship, and the earning of the freight, which was paid by the freighters to *the agent for the underwriters on ship*, under an indemnity from them against any claims which might be made thereto, either by the plaintiffs or by the underwriters on freight. The plaintiffs had duly assigned over by indenture, in *February* 1801, the ship *Thomas*,

Thomas, and all the interest, property, claim, or demand of the plaintiffs, in, to, or out of the said ship and her appurtenances to two persons, in trust for all the *underwriters on the ship.*

After two arguments, and time taken to deliberate, Lord *Ellenborough*, Chief Justice, delivered the judgment of the Court.—"The novelty of the question in this case, the value of the property, and the extent to which some of the principles laid down in the argument seemed to lead, made us desirous of every information on the different points which might arise between the several parties interested, before we came to our decision; and, therefore, we wished for a second argument on the effect of an abandonment of the ship on the accruing freight. If the question which arises upon this case be stripped of extraneous circumstances, it appears to resolve itself into this single point, Whether the freight have been in this case lost or not? If the fact be merely looked at, freight in the events which have happened has not been lost, but has been fully and entirely earned and received by, *or on behalf of the* plaintiffs, the assured: and if so, no loss can be properly demandable from the underwriters on freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be, in any other manner or sense, lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an *abandonment of the ship, which abandonment was the act of the assured themselves*, and with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that *quâcunque viâ datâ*, that is, whether there has been no loss at all of freight, or being such, it has been a loss only occasioned by the act of the assured themselves, that they are not entitled to recover. There must, therefore, be a judgment of nonsuit."

It is very clear, I conceive, from this judgment, what was the leaning of the learned judges of the Court of King's Bench upon the great question. This is more apparent from what passed in a subsequent case, when Lord *Ellenborough*, in the course of the argument at the bar, said, that he felt great difficulty in saying that after an abandonment of a ship by the

Sharp v. Gladstones, 7 East's R. 24.

owner to the underwriters *on ship*, he could abandon *the freight which seemed to follow the property in the ship*, being the earnings made by the subsequent use of that, which was then become the property of others, to another set of underwriters: and if he could not, then it might be considered, that having nothing of his own to abandon to the underwriters on freight, it was the same as if there had been no abandonment, in which case the plaintiff (who had been one of the underwriters on freight) could not recover the freight from the owner. To this opinion Mr. Justice *Lawrence* seemed to incline, and probably, if the circumstances of that case would have admitted it, we should have arrived at a clear and explicit judgment on this very important point between the two different sets of underwriters; or in other words, whether the owner of the ship can effectually abandon to the underwriters *on freight*, the *freight* which the ship may earn after the abandonment of the ship has been made also to the underwriters upon it. But Mr. Justice *Le Blanc* observed, and this was agreed to by the counsel on both sides, that the only question raised for the consideration of the Court, by the case reserved, was, whether the defendant (the owner) were entitled to make any, and what deductions out of the freight, it being assumed, that he was liable, in the first instance, to pay the freight over to the plaintiff. It became the more necessary to settle this point of the deductions which might lawfully be made from the freight, because neither of the former cases of *Thompson* v. *Rowcroft*, (*ante*, p. 268.) nor *Leatham* v. *Terry*,
4 East, 52. (*ante*, p. 271.) had given any clear opinion upon it; Lord *Ellenborough*, upon a suggestion made by the defendant's counsel at the close of the decision of the former case of *Thompson* v. *Rowcroft*, rather inclining to think that the wages, provisions, &c. were to fall on the owner of the ship, or the
3 Bos. & Pull. 485. *underwriters on ship*: in the latter case the Court are made to say, that the underwriters *on freight* were to contribute proportionally to the expence of bringing the cargo home.

In the case of *Sharp* v. *Gladstones*, the owner claimed to have paid the following charges upon the ship and freight, a proportion of which he desired to deduct from the net proceeds of the freight received by him:

Expences

Expences of the ship and crew at *Petersburgh* and *Elsineur*, including port charges and the expences of shipping the cargo on which the freight has been paid - -	£305	14	0
Insurance on the same - -	9	19	6
Wages of, and provisions for the master, mate, and seamen, from the time they were liberated in *Russia* till discharged in *England*, being four months - - -	223	6	11
Charges paid at *Liverpool* on ship and cargo	91	16	5
Insurance on ship home 3000*l.* at 4 guineas, less returns - - -	90	2	0
Wages to the master and crew during their detention in *Russia*, being six months	270	0	0
Diminution in the value of the ship and tackle, by wear and tear, on the voyage home, she being then employed for the benefit of those interested in the freight - -	300	0	0

Lord *Ellenborough*, after premising that no question arose here between the two sets of underwriters, said, that the underwriters on freight, to whom it has been abandoned, having paid as for a total loss, are entitled to the benefit of salvage, and *the net salvage is that which remains of the subject matter, after payment of the expences of saving it.* After the abandonment, the assured was to be considered as the agent of both sets of underwriters, and he laid out what was necessary for the benefit of the whole concern, without applying the several proportions to each, at the time, for their separate interests. But each set of underwriters is entitled to have their respective salvage subject to the deductions applicable to each. With respect, then, to the particular items, the charges paid at *Liverpool* are to be struck out; and so is the insurance on the ship, which can be no charge on the freight; and so must the last item of diminution of the value of the body of the ship and tackle by wear and tear. The remaining items must be considered as so many deductions from the salvage, which must be apportioned according to the respective interests of the two sets of underwriters in the judgment of the arbitrators to whom it is agreed to refer the amount. The expence of putting the cargo on board was certainly altogether

 for

for the benefit of the underwriters on freight; and the expences at *Petersburgh* and *Elsineur* must be apportioned. Then His Lordship said, "As to the general question, whether an abandonment could be made to the underwriters on freight, after an abandonment to the underwriters on ship, I beg to be understood as giving no opinion: and with respect to that, this not being the case of a *chartered* but of a *seeking* or *general* ship, a distinction may arise."

Ker v. Osborne. 9 East, 378. The question has once more occurred upon similar facts to those already stated; and the parties agreed to take no advantage of form on either side, but to rest on the merits. But the Court said, this agreement of the parties could not alter the case, nor bind the Court to give judgment on the merits, when there appeared to be a clear objection to the action itself. The objection to the decision of this case upon the merits was, that the money had been paid over to a trustee, to hold for the party entitled; and the action for *money had and received* was brought, not against the trustee or stakeholder, but against the original party.

Green v. The Royal Exc. Comp. 1. Marsh. 447. and 4 Taunt. 68. But in a still more modern case, one of the questions was, Whether in a policy *on freight* and a loss, an abandonment was necessary? The Court of Common Pleas held it was not, Lord Chief Justice *Gibbs* observing, "he could not understand what there was to be abandoned."

Thus, as far as the decisions have actually gone, the question may still, and, indeed, these last decisions require that it should, be considered as open; although, as far as opinions may be collected from observations thrown out in the course of argument, the inclination of the Court seems to be in favour of the underwriters *on ship*.

Ch. 4. From what was said in a former chapter, and from the cases recited, it will appear, that in wager policies, it was usual to set up a total loss between third persons, for the purpose of their wager, though in fact the ship was safe, and restored to the owner. But in some of these cases the loss was held not to be total; and as in most of them general verdicts were given, and no report of the Judge's direction is to be found, it is

is now impossible to determine upon what grounds the decisions turned. As has been truly said, however, these questions never can arise again, because they originated from wager policies, which are now prohibited by law. But as the case of *Pole* v. *Fitzgerald* was one of those, in which the majority of the Judges, and the House of Lords, held that though the ship might be deemed lost for a time, yet, as she was afterwards recovered, the event of a total loss had not finally happened, according to the construction of the wager; and as it has frequently occurred in the course of our enquiries, it may be proper to give a short account of it in this place. (*a*)

It was an action on a policy of insurance on the ship *Good-fellow* privateer, at and from *Jamaica*, to any ports and places where and whatsoever, at sea or shore, a cruising from place to place, for and during the term and space of four calendar months; the ship was valued at 1000*l.* *without further account*, and free from average. The defendant in 1744 had subscribed 100*l.*, and the plaintiff declared for a total loss of the voyage by a mutiny of the men.

Fitzgerald v. Pole, 5 Brown's Parl. Cases, 131. Ambl. 214. S. C.

The cause came on to be tried at *Guildhall*, before the Lord Chief Justice *Lee*, when a special verdict was found, stating, That the defendant had subscribed the policy stated in the declaration: that the *Goodfellow* was an *English* privateer, duly commissioned; was safe at *Jamaica* on the 14th of *June* 1744, and sailed from thence the same day: that on the 10th of *July* 1744, she took a *French* prize of the value of 4,200*l.* sterling; that afterwards the said ship was sailing on her cruise, for a port or place called the *River of Dogs*, to fetch water; and while she was so sailing towards the *River of Dogs*, and within the four months mentioned in the policy, the crew mutinied against the captain and his officers; and by force carried the said ship, against the will of the captain and officers, who could not resist, to *Jamaica*: and before her arrival there, causelessly, against the consent of the said captain, seized the boat,

(*a*) A very full and accurate report of the judgment given in the Exchequer-chamber by Lord Chief Justice *Willes* may be seen in Mr. *Durnford*'s admirable edition of that learned Judge's own MS. Notes, 641.

 fire-arms,

fire-arms, and cutlasses, carried off the same, and deserted the privateer, by which the voyage and cruise were totally prevented and lost for the remainder of the four months: that the ship arrived at *Jamaica*, and was there in good safety at and after the end of the four months; but was prevented, by the mutiny and desertion, from further pursuing her cruise: that the person insured had interest in the ship to the amount of the sum insured.

This case was argued in the King's Bench, and judgment was given for the plaintiff. Upon a writ of error, the Court of Exchequer-chamber unanimously reversed that judgment. The House of Lords afterwards confirmed the judgment of reversal, being of opinion, with the majority of the Judges, that the insurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in case of a total loss; and the ship being found, by the special verdict, to be in good safety, at her proper port, at and after the end of the four months, for which the insurance was made, there could be no loss. The counsel for the plaintiff cited many cases, in which the plaintiffs had judgment for a total loss, although the ships remained in being; most of which have already been referred to in the chapter upon capture. But those cases were absolutely denied by the other side; or, if admitted at all, it was insisted, that they made for the defendant. This circumstance, among many others, stated in the introduction of this work, serves to evince the great superiority which the modern practice of our Courts, in matters of insurance, has over the ancient.

Vide ante, c. 4. 2 Burr. 1200.

See the Introduction.

In many of the maritime countries on the continent of *Europe*, the time, within which the abandonment must be made, is fixed by positive regulation. Thus in *France*, it is ordained, that all cessions or abandonments, as well as demands in virtue of the policy, shall be made as follows:—In six weeks, for losses happening on the coasts of the country, where the insurance was made: in three months, in other provinces of our kingdom: in four months, on the coast of *Holland*, *Flanders*, and *England*: in a year, in *Spain*, *Italy*, *Portugal*, *Barbary*, *Muscovy*, *Norway*: and in two years, for the coast of *America*, the *Brasils*, *Guinea*, and other distant countries. When these terms

Ord. of Lew. 14. tit. Infurance, art. 48.

terms are elapsed, the demands of the assured shall not afterwards be admitted. In cases of detention, the same ordinance provides, that the abandonment shall not be made before six months, if it happen in *Europe* or *Barbary*. If in a more distant country, in a year; both to commence from the day of the notifying this detention to the insurers. A similar regulation to that last-mentioned is to be found in the ordinances of *Bilboa*. Art. 49. 2 Mag. 416.

In the law of *England* till lately we had no limitation of time, with respect to abandonment, at least that I was able to find: and I believe that none such existed. But from what has been said in the preceding part of this chapter, it would appear, that the insured has a right to call upon the underwriter for a total loss, and of course to abandon, as soon as he hears of such a calamity having happened, his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property lost: because, by the abandonment, that chance devolves upon the underwriter, by which means the intention of the contracting parties is fully answered, and complete justice is done.

In a modern decision it has been held by the Court of King's Bench, that as soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not: and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they wave their right to abandon, and can never afterwards recover for a total loss. This determination was certainly equitable and just; for otherwise it was impossible to say, at what time the responsibility of the underwriter was to end; they would be liable to be called upon to contribute at any indefinite period, and a great deal of uncertainty would be introduced into this system of law. Mitchell v. Edie, 1 Term Rep. 608.

In a still more recent case, the doctrine laid down by the Court in *Mitchell* v. *Edie*, as to the obligation upon the assured to make his election, whether he will abandon or not, was adopted and confirmed.

Allwood v. Henckell, Guildhall, Sittings in B. R after Mich. 1795.

Case on a policy of assurance on linen on board the *Amphitrite*, at and from *London* to *Jamaica*.

The *Amphitrite* was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property insured was plundered and taken out of the ship. The captain, boatswain, and all but seven men, were taken out of her: a fortnight after she was captured, as the captors were making their way to *America*; the ship, with the remainder of her cargo, was retaken by an *English* frigate, and taken under a prize-master to *Antigua*. The ship and cargo were both sold under a decree of the Vice-Admiralty Court of *Antigua*, by a prize-agent, who received the proceeds, and was to pay them over to the concerned, upon payment of one-eighth salvage pursuant to the last prize-act.

The capture and recapture were entered at *Lloyd's* on the 15th of *February* 1795; but it was not known where the ship was carried till the 30th of *March*, when a letter was received at *Lloyd's*, addressed to the owners and freighters and underwriters on ship *Amphitrite* and cargo, from the Judge of the Vice-Admiralty Court of *Antigua*, informing them of the arrival and sale of the ship and cargo, under a decree of the Court, and desiring to have some agent appointed to remit the proceeds to *England*. Powers of attorney were sent out in *April* by the assured for this purpose; and the proceeds were desired to be remitted to the banking-house of *Smith*, *Payne*, and *Smith*, one of which gentlemen was agent to the assured. The defendant was acquainted in *April* of the loss, but no abandonment was proved to have been made till *August*, near four months after Mr. *Payne*, who was the plaintiff's agent, had sent out the power of attorney. On the part of the plaintiff, it was contended that, admitting there was no abandonment, in this case the property having been absolutely sold and converted into money, before the parties knew where the ship was taken to, the loss was absolutely total in its nature; and therefore there was no occasion for an abandonment.

Lord *Kenyon*, though he did not give any decided opinion upon this point, inclined to think, "that an abandonment

 was

was necessary; and that the case was the same as if the property had remained in *specie* at *Antigua*, and had not been sold (*a*). That the assured is not bound to abandon in any case; and might, in case the sales had been very advantageous, have taken the benefit of them in the same manner as they might have retained this property, if it had remained in specie. *But the assured must make his election speedily, whether he will abandon or not, and put the underwriter into a situation to do all that is necessary for the preservation of the property, whether sold or unsold. He cannot lie by and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them.*"

See also Anderson v. The Royal Exch. Assur. Company, 7 East, 38, and Barker v. Blakes, 9 East, 283. Acc. ante, see also Parmeter v. Todhunter Sittings after Mich. 1808.

Verdict for plaintiff, subject to an account as for an average loss.

The making the election to abandon *speedily*, or in the *first instance*, means the earliest opportunity after they have examined into the state of the cargo; but they are not to lie by, in order to govern their determination by the rise or fall of the market. Nor can the assured, when they have not abandoned in the first instance, afterwards do so, when they find in the result that the salvage and expences exceed the value of the ship.

Gernon, v. The Royal Exchange Assurance. 2 Marsh, 88. Martin, v. Crokat, 14 East, 465.

But if the insured, hearing that his ship is much disabled and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. Because the reason why notice of abandonment is deemed necessary, is to prevent surprize or fraud upon the underwriter: but in the case put, they have, by their own act, superseded the necessity of notice.

Da Costa v. Newnham 2 Term Rep. 407.

(*a*) In the case of *Hodgson* and another v. *Blackiston*, Sittings after Hilary Term, 38 G. 3. in the King's Bench, it was held, that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received.

We

We have thus taken a view, in this and the eight preceding chapters, of the nature of that instrument by which the contract of insurance is effected; and of the different modes, by which it may be construed; we have treated of the various losses, to which the underwriter subjects himself by that contract; we have shewn, when the losses are to be considered as partial, when as total; and in what cases, and under what circumstances the insured shall be allowed to abandon to the underwriter. The course of our inquiry now naturally leads us to observe, in what instances the insurer is discharged from any responsibility; either on account of the contract being void, from its commencement, by reason of some radical defect; or because the insured has failed to perform some of those conditions, necessary to be fulfilled on his part, before he can call upon the insurer for an indemnity.

CHAPTER X.

Of Fraud in Policies.

IN treating of those causes, which make policies void from the beginning, or in other words, which absolutely annul the contract, it will be proper in the first place to consider, how far it will be affected by any degree of fraud. In every contract between man and man, openness and sincerity are indispensably necessary to give it its due operation; because, fraud and cunning once introduced, suspicion soon follows, and all confidence and good faith are at an end. No contract can be good, unless it be equal; that is, neither side must have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person insured, and therefore it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete. Accordingly the learned Judges of our courts of law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith and the strictest integrity, have constantly held that it is vacated and annulled by any the least shadow of fraud or undue concealment.

1 Blac. Com. 460. Grot. de jure belli, lib. 2. c. 12. s. 23. Pufendorf de jure nat. l. 5. c. 9. s. 8. Bynkershoek. quest. jur. p. iv. l. 4. c. 26. Ord de Lew. 14. s. 38. 1 Black. 594. 3 Burr. 1909.

After what has been said, it will hardly be necessary to mention, that both parties, the insurer and insured, are equally bound to disclose circumstances that are within their knowledge; and therefore if the insurer, at the time he underwrites, can be proved to have known that the ship was safe arrived, the contract will be equally void, as if the insured had concealed from him some accident, which had befallen the ship.

In

In perusing the numerous cases and decisions, which, I am sorry to say, are to be found in our books under this head, it occurred to me, that they were liable to a threefold division: 1st, The allegation of any circumstances, as facts, to the underwriter, which the person insured knows to be false: 2dly, The suppression of any circumstances, which the insured knows to exist; and which, if known to the underwriter, might prevent him from undertaking the risk at all, or if he did, might entitle him to demand a larger premium; and, lastly, a misrepresentation. The last of these, a *misrepresentation*, seems to
Doug. 247. fall under the first head, the *allegatio falsi*; and so in some measure it does; because wherever a person knowingly and wilfully misrepresents any thing, he asserts a falsehood. But it was thought necessary to make a division for itself; because if a *material* fact be misrepresented, though by a mistake, the contract is void, as much as if there had been actual fraud: for the underwriter has computed his risk upon information, which was false. Of each of these in order. (*a*)

Nothing can be so clear a proof of fraud, as the assertion of the truth of some circumstance, which the person asserting it must know to be false. In our reporters, we do not meet with so many cases under this division of the subject, as under the two following: and indeed, from the nature of the thing, it is impossible we should; because in such a case, the only question is, did the insured assert this to be the truth. If he did, the inquiry is at an end; because we are now presuming it to be the assertion of a circumstance within his own knowledge. This being a mere question of fact, is not a subject for a reporter. But in the other cases, there is greater room for investigation; we may properly inquire, for instance, whether the insured was bound to disclose this fact; whether the misrepresentation was in a material part; and many other similar questions of which we shall see the necessity hereafter.

The few following cases will evidently shew, that our idea was

(*a*) A distinction has lately occurred, where the person, representing the time of the ship's sailing, was an owner *of goods* only, and did it upon a *bonâ fide* expectation; the Court held this did not conclude him, for he could have no control over the event.—*Bowden* v. *Vaughan*, 10 *East*, 416.

was right, when we supposed, that under the head of the *allegatio falsi*, the only inquiry would be, whether the person insured, knowing the contrary, asserted a particular thing to be true.

In a case before Lord Chief Justice *Holt*, in the reign of *William* and *Mary*, that learned Judge held, that if the goods were insured as the goods of an *Hamburgher*, who was an ally, and the goods were, in fact, the goods of a *Frenchman*, who was an enemy; it was a fraud, and that the insurance was not good. Skinner, 327.

In another case, a letter being received, stating, that a ship sailed from *Jamaica* for *London*, on the 24th of *November*, after which an insurance was made, and the agent told the insurer, that the ship sailed the latter end of *December*; this was also held by Lord Chief Justice *Lee* to be a fraud, and the defendant had a verdict upon this point, there being another in the cause not material to be mentioned here. Roberts v. Fonnereau, Sittings at Guildhall after Trin. 1742. MSS. penes me.

Upon a special case reserved for the opinion of the Court, the following circumstances appeared: Woolmer v. Muilman, 3 Burr. 1419. 1 Black. 427.

It was an action on the case, brought for the recovery of a total loss, on a policy of insurance made on goods and merchandizes on board the ship *Bona Fortuna*, at and from *North Bergen* to any ports or places whatsoever, until her safe arrival in *London*. It was underwritten thus: "Warranted neutral ship and property." The defendant underwrote the policy for 150*l*. The defendant pleaded the general issue, and paid into Court the premium received by him for the said insurance. This cause came on to be tried at *Guildhall* before Lord *Mansfield*; when it was admitted, that the plaintiff had interest on board the ship to a large value, to the amount of the sum insured. The ship with the goods and merchandizes so loaden, and being on board her, after her departure from *North Bergen*, and before her arrival in *London*, proceeding on her voyage, was, by the force of winds and stormy weather, wrecked, cast away, and sunk in the seas; and the said goods and merchandizes were thereby wholly lost. It was expressly stated, "that the ship or vessel,

" sel, called the *Bona Fortuna*, and the property on board, " at and before the time she was lost, were not neutral pro- " perty, as warranted by the said policy."

Lord *Mansfield*, and the rest of the Court, were of opinion, that it was too clear a case to bear an argument. This was *no contract;* for there was a falsehood, in respect of the condition of the thing insured: because the plaintiff insured neutral property, and this was not neutral property.

From the preceding case, we may collect this principle, that a false assertion in a policy will vitiate the contract; even though the loss happen in a mode not affected by that falsity.

Another observation is suggested by the perusal of the case of *Woolmer* and *Muilman*. It arose upon a warranty; and the learned judges declared, that the warranty being false, there was *no* contract. Now, as we shall see, when we come to the chapter on Warranties, the general rule with respect to them is this, that the non-compliance with them does not vacate the contract from the beginning; but it amounts to much the same thing, namely, that the insured, not having complied with those conditions, which he has taken upon himself to perform, cannot recover against the underwriter.

But the following answer is submitted, which, if allowed, will reconcile any seeming difference that arises in the cases upon the subject. Wherever a man warrants a thing to be true, which, at the time he does so, he must unavoidably know to be false, it comes under the *allegatio falsi*, and the contract is void, as in the case just reported. But if he warrant or undertake that a certain thing shall be done, for instance, that the ship shall sail with convoy, or on a particular day: these being circumstances materially varying the risk, the underwriter shall not be responsible for a loss, if they are not complied with; but the contract is not void from the beginning, nor does the insured incur any moral guilt; because they do not depend entirely for their performance upon the will of the person insured, nor could they be within his knowledge at the time he entered into the contract.

A short

A short time after the case of *Woolmer* against *Muilman* had been decided, another very similar case came on at *Guildhall* before Lord *Mansfield*.

It was an action on a policy of insurance on goods laden on board such a ship, warranted a *Portugueze*. The insurance was made during the *French* war, when the premium would have been much higher on an *English* ship. The plaintiff gave partial evidence of her being a *Portugueze*; and that she was obliged, on account of perils of the sea, to put into a *French* port, by which the cargo was spoiled. This was admitted by the defendant, who contended that during her stay at the *French* port, she was libelled, and condemned as not being *Portugueze*: and that although the goods were lost by a different peril, yet in fact the ship was not *Portugueze*, (being insured as such,) and that this vitiated the policy *ab initio* — and this was agreed to be law. In order to prove that she was not *Portugueze*, the defendant produced the sentence of condemnation, and the confirmation thereof in the courts of *France*; and an answer of the present plaintiff in the Court of Chancery here, by which it was admitted, that the ship was condemned as not being, or under pretence of not being, *Portugueze*.

Fernandes v. Da Costa, Sitt. after Hil. 4 G. 3.

Lord *Mansfield*. — "As the sentence is always general, (without expressing the reason of the condemnation,) attested copies of the libel ought in strictness to have been produced, to shew upon what ground the ship was libelled against. But as the plaintiff has, by his answer in Chancery, admitted that she was condemned, as not being *Portugueze*; when, added to the expression used in the sentence of confirmation, *that the ship was condemned in the court of prizes*, there is sufficient evidence for us to proceed upon." The defendant, the underwriter, had a verdict.

The second species of fraud, which affects insurances, is the concealment of circumstances, known only to one of the parties entering into the contract. Upon this head, the principles of law are perfectly clear, free from doubt or possibility of error. Concealment of circumstances vitiates all contracts, upon the principles of natural law. Insurance is a contract of

1 Black. Rep. 465.

of speculation. The facts, upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter must therefore rely upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate. If a mistake happen, without any fraudulent intention, still the contract is annulled, because the risk is not the same which the underwriter intended. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his belief of the contrary.

1 Black. Rep. 594.

These principles have been uniformly supported by a variety of decisions.

Da Costa v. Scandret, in Chancery, 2 P. Wms. 170.

One having a doubtful account of his ship, that was at sea, namely, that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard either as to the hazard, or the circumstances, which might induce him to believe that his ship was in great danger, if not actually lost. The insurers bring a bill for an injunction, and to be relieved against the insurance as fraudulent.

Lord Chancellor *Macclesfield*. — "The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it. For if this circumstance had been discovered, it is impossible to think, that the insurers would have insured the ship at so small a premium as they have done: but either would not have insured at all, or would have insisted on a larger premium, so that the concealment of this intelligence is a fraud." Whereupon the policy was decreed to be delivered up with costs, but the premium to be paid back, and allowed out of the costs.

Seaman v. Fonnereau, 2 Stra. 1183. and MSS. penes me.

In another case it appeared, that on the 25th of *August* 1740, the defendant underwrote a policy from *Carolina* to *Holland*. It came out in evidence, that the agent for the plaintiff had, on the 23d of *August* (two days before the policy

was

was effected), received a letter from *Cowes*, dated the 21st of *August*, wherein it is said: "On the 12th of this month, I "was in company with the ship *Davy* (the ship in question); "at twelve at night lost sight of her all at once; the captain "spoke to me the day before that he was leaky, and the next "day we had a hard gale." The ship, however, continued her voyage till the 19th of *August*, when she was taken by the *Spaniards*; and there was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated the 27th *June* before.

Webster v. Forster, 1 Esp. R. 407. Willis v. Glover, 1 New Rep. 14. & Lynch v. Dunsford, 14 East, 494. Similar doctrine.

Lord Chief Justice *Lee* declared, "that as these are contracts upon chance, each party ought to know all the circumstances. And he thought it not material, that the loss was not such an one as the letter imported; for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events. He therefore thought it a strong case for the defendant." The jury found accordingly.

But the time of the ship's sailing is not always material to be communicated, unless the ship be a missing ship.

Foley v. Moline, 1 Marsh. 117.

In an action on a policy of insurance, the case was, that the ship was insured *at and from Genoa*, liable to average; her loading consisting of pot-ash, verdigrease, cotton, and other perishable commodities. This loading was put on board *at Leghorn* the 10th of *August*, and the vessel had lain at *Genoa* above five months, being originally bound for *Dublin*; but losing her convoy, she put into *Genoa* the 13th of *August*, and lay there till the 5th of *January*, when she sailed. And the insurance was made the 20th of *January*; at which time these circumstances were known to the assured, but not communicated to the underwriter. A few days after she put to sea, she was shattered by a storm, and the cargo considerably damaged. The jury found a verdict for the plaintiff; and a new trial was moved for on this ground, that the policy was bad *ab initio*, for want of a due disclosure of the circumstances.

Hodgson v. Richardson, 1 Black. Rep. 463.

 Lord

Lord *Mansfield.* — "The question is, whether here was a sufficient disclosure; that is, whether the fact concealed was material to the risk run. This is a matter of fact, and if material, the consequence is matter of law, that the policy is bad. Now who can say, that no risk was run, during the five months' stay at *Genoa*, or no damage happened in that period? The policy is founded on misrepresentation: the ship is insured "at and from *Genoa*, to *Dublin*; the adventure to "begin from the loading, to equip for this voyage." This plainly implies, that *Genoa* was the port of loading: and at the trial, all the witnesses said, that by usage, it was material to acquaint the underwriter, whether the insurance was to be at the commencement or in the middle of a voyage.

Mr. Justice *Wilmot.* — "The fact disclosed by this policy is not true, that *Genoa* is the loading port; for so it must be understood. In such cases I shall not speculate upon the materiality or immateriality of the fact. Not but that I think the length of the stay at *Genoa* is very material, in case of such perishable commodities."

Mr. Justice *Yates.* — "The concealment of material circumstances vitiates all contracts, upon the principles of natural law. A man, if kept ignorant of any material ingredient, may safely say, it is not his contract. And I think this fact material, for the reasons before given." A new trial was accordingly granted.

The doctrine, so accurately laid down in the preceding cases, has since been the principle on which several verdicts have been given, in cases of this nature; a few of which it will be proper to mention.

Ratcliffe and another v. Shoolbred, Sittings at Guildhall, after Trin. 1780.

An action was brought on a policy of insurance on goods on board the *Matty* and *Betty*, at and from the coast of *Africa*, to her last discharging port in the *British West Indies*. The objection made to paying the loss was, that there had been a material concealment or misrepresentation of the true state or situation of the ship and voyage at the time of underwriting the policy. The ship had been sent out to trade on the coast of *Africa*, with directions to proceed from thence to the *British* *West*

West Indies, and to stop at *Barbadoes*, if she could get a *sale*; if not, to proceed to *Montego Bay*. On the 2d of *October* she sailed from *St. Thomas's* on the coast of *Africa*, with a cargo of slaves, and was taken on the 6th of *December* following by an *American* privateer. A letter was received by a house at *Liverpool* on the 21st of *February*, mentioning that the ship was well, and had sailed from *St. Thomas's* on the 2d of *October*. This information was communicated next day to the plaintiffs, who, in consequence of it, wrote the same evening to two different brokers, to get a *new* insurance on the ship, there having been one before, and another on the cargo, which last was the subject of the present action. In the instructions to the brokers, the plaintiffs say nothing of the ship from the time of her first sailing; but to one of the brokers they wrote thus:—"We should be glad if you would "get us 600*l.* more on the ship, as she is *rather long*; and we "think it not prudent to run so large a risk at so critical a "time. We expect to hear soon of her." It had afterwards occurred that the policy might be effected, if intimation was not given of the letter which had been received. The broker, therefore, by direction of the plaintiffs, added to the instructions:—"The above ship was on the coast the 2d of *October*;" but said nothing of her having sailed from *St. Thomas*. The policy was dated the 21st of *March*.

Lord *Mansfield*.—"The insured is bound to represent to the underwriter all the material circumstances of the ship and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable; *à fortiori*, if he suppress or misrepresent from fraud. The question is, Whether this be one of those cases which is affected by misrepresentation or concealment? If the plaintiffs concealed any material part of the information they received, it is a fraud; and the insurers are not liable." The jury found for the defendant agreeably to His Lordship's direction.

So the underwriter had a verdict, where the assured had on the 24th of *November* received a letter from *Lisbon* dated the 8th, stating the ship to be then ready to sail, and did not effect the insurance till the 2d of *December*, and did not then communicate the letter. M'Andrews v. Bell, 1 Esp. R. 373.

In

Fillis v. Brutton, Sittings at Guildhall after H. 1782.

In another case, the policy was on the brig *Richard*, at and from *Plymouth* to *Bristol*. Several letters passed between the plaintiff and the broker, who effected the policy, as to the premium at which the insurance could be made: at last, it was underwritten four guineas *per cent*. The broker's instructions stated *the ship ready to sail on the 24th of December*. The broker represented to the underwriter that the ship was in port, when in fact she had sailed the 23d of *December*.

Lord *Mansfield* said, "that this was a material concealment and misrepresentation." The jury, however, hesitated: His Lordship then laid down the following as general principles:— "In all insurances, it is essential to the contract, that the assured should represent the true state of the ship to the best of his knowledge. On that information the underwriters engage. If he state that as a fact which he does not know to be true, but only believes it, it is the same as a warranty.] He is bound to tell the underwriters truth. In the present insurance, the only material point is this,—Had the ship sailed, or was she in port?" Upon this the jury found for the defendant.

1 Black. Rep. 593.

But although the rule is laid down thus generally, that one of the contracting parties is bound to conceal nothing from the other; yet it is by no means so general as not to admit of an exception. *Aliud est celare, aliud tacere.* There are many matters as to which the insured may be innocently silent. 1st, As to what the insurer knows, however he came by that knowledge. 2d, As to what he ought to know. 3d, As to what lessens the risk. An underwriter is bound to know political perils, as to the state of war or peace. If he insure a privateer, he needs not be told her destination. And, as men reason differently from the same facts, he needs not be told another's conclusions from known facts.

These ideas were fully entered into, explained and illustrated in the argument of Lord *Mansfield*, in delivering the opinion of the Court in *Carter* v. *Boehm*.

Carter v. Boehm, 3 Burr. 1905. and

This was an insurance cause upon a policy, interest or no interest, without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, governor *George Carter*.

Carter. The jury found a verdict for the plaintiff; upon which a new trial was moved for on the ground that circumstances had not been sufficiently disclosed. Lord *Mansfield* reported the evidence given at the trial; by which it appeared, that it was a policy of insurance for one year, namely, from the 16th of *October* 1759, to the 16th of *October* 1760, for the benefit of the governor of *Fort Marlborough*, *George Carter*, against the loss of *Fort Marlborough*, in the island of *Sumatra*, in the *East Indies*, by its being taken by a foreign enemy. The event happened: the fort was taken by Count *D'Estaigne*, within the year. The first witness was *Cawthorne* the broker, who produced the memorandum given by the governor's brother (the plaintiff) to him: and the use made of these instructions was to shew, that the insurance was made for the benefit of Governor *Carter*, and to insure him against the taking of the fort by a foreign enemy. Both parties had been long in Chancery; and the depositions, there made on both sides, were read as evidence upon this trial. It was objected on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the *French*; which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother *Roger Carter*, his trustee, and the plaintiff in this cause: the second was from the governor to the *East India* Company.

1 Black. Rep. 593. Vide ante c. 1.

The evidence in reply to this objection, consisted of three depositions in Chancery; setting forth, that the governor had 20,000*l.* in effects; and had only insured 10,000*l.*: and that he was guilty of no fault in defending the fort. The first of these depositions was Captain *Tryon*'s, which proved, that this was not a fort proper or designed to resist *European* enemies; but only calculated for defence against the natives of the island of *Sumatra*; that the governor's office is not military, but only mercantile: and that *Fort Marlborough* is only a subordinate factory to *Fort St. George*. There was no evidence to the contrary; and a special jury found a verdict for the plaintiff.

After argument at the bar, upon the motion for a new trial, and time taken by the Court to deliberate, their unanimous opinion was delivered by

 Lord

Lord *Mansfield*.—" This is a motion for a new trial. In support of it the counsel for the defendant contend, that some circumstances in the knowledge of Governor *Carter*, not having been mentioned at the time the policy was underwritten, amount to a concealment, which ought, in law, to avoid the policy. The counsel for the plaintiff insist, that the not mentioning these particulars does not amount to a concealment, which ought, in law, to avoid the policy; either as a fraud, or as varying the contract. 1st, It may be proper to say something in general of concealments which avoid a policy. 2dly, To state particularly the case now under consideration. 3dly, To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

" First. Insurance is a contract upon speculation. The special facts, upon which the risk is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts to his statement, and proceeds upon confidence, that he does not keep back any circumstances within his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist. The keeping back such circumstances is a fraud; and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void: because the risk run is really different from the risk understood, and intended to be run at the time of the agreement. The policy would equally be void against the underwriter, if he concealed any thing; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent as to grounds open to both, to exercise their judgments upon. *Aliud est celare; aliud tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare, emolumenti tui causâ, velis eos, quorum intersit id scire.* This definition of concealment, restrain-

Cicero de Officiis, lib. 3. c. 12, 13.

ed

ed to the efficient motives, and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed. There are many matters, as to which the insured may be innocently silent; he needs not to mention what the underwriter knows, *scientia utrinque par pares contrahentes facit.* An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured needs not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed, and understood to be run by the express terms of the policy. He needs not be told general topics of speculation: as for instance, the underwriter is bound to know every cause, which may occasion natural perils; as the difficulty of the voyage; the kind of seasons; the probability of lightning, hurricanes, and earthquakes. He is bound to know every cause which may occasion political perils; from the rupture of states, from war, and the various operations of war. He is bound to know the probability of safety, from the continuance and return of peace: from the imbecillity of the enemy, through the weakness of their councils, or their want of strength. If an underwriter insure private ships of war, by sea, and on shore from ports to ports, and from places to places, any where, he needs not be told the secret enterprises upon which they are destined; because he knows some expedition must be in view: and from the nature of his contract, he waives the information, without being told. If he insure for three years, he needs not be told any circumstance to shew it may be over in two: or, if he insure a voyage with liberty of deviation, he needs not be told what tends to shew there will be no deviation. Men argue differently, from natural phænomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other. The reason of the rule, which obliges the parties to disclose, is to prevent fraud, and encourage good faith, it is adapted to such facts as vary the nature of the contract, which one privately

 knows,

knows, and the other is ignorant of, and has no reason to suspect. The question, therefore, must always be, "Whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement, or a concealment: fraudulent, if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run." (a)

"2dly. This brings me, in the second place, to state the case now under consideration. The policy is against the loss of *Fort Marlborough*, from being destroyed by, taken by, or surrendered unto any *European* enemy, between the 16th of *October* 1759 and the 16th of *October* 1760. The underwriter knew at the time, that the policy was to indemnify, to that amount, *George Carter*, the *governor of Fort Marlborough*, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at *Fort Marlborough*, the 22d of *September* 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the *East India* Company, which the Company offered to put into my hands; but would not deliver it to the parties, because it contained some matters, which they did not think proper to be made public. An objection occurred to me at the trial, whether a policy against the loss of *Fort Marlborough*, for the benefit of the governor, was good; upon the principle, which does not allow a sailor to insure his wages. But considering that this place, though called a fort, was really but a factory, or settlement for trade: and that he, though called a governor, was really but a merchant: considering too, that the law allows a captain of a ship to insure goods, which he has on board, or his share in

Vide ante, c. 1.

(a) Within this principle Lord *Ellenborough* was of opinion, that it was not necessary, where an insurance was made on the homeward voyage, to communicate a letter from the captain, stating the damages he had encountered on the outward voyage, and describing the ship as being then unseaworthy, and standing in need of a great many repairs, as governing the time when the ship would be able to sail; for if this were so, said His Lordship, it would be necessary in all cases to inform the underwriters when any repairs are wanting. *Beckwith* v. *Sydebotham*, 1 *Campbell*, N. P. Cases, p. 116. And see also post. c. 11. the case of *Shoolbred* v. *Nutt*, and of *Hayward* v. *Rogers*.

the

the ship, if he be a part owner, and the captain of a privateer, if he be a part owner, to insure his share: considering also, that the objection could not, upon any ground of justice, be made by the underwriter who knew him to be governor, at the time he took the premium, and as with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be appehended: I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially as the objection did not come from the bar. Though this point was mentioned at the last trial, it was not insisted upon; nor has it been seriously argued, upon this motion, as sufficicient alone to vacate the policy: and if it had, we are all of opinion, that we are not warranted to say, that it is void upon this account. Upon the plaintiff's obtaining the two former verdicts, the underwriters went into a court of Equity; where they have had an opportunity to sift every thing to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses that were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term. The plaintiff proved without contradiction, that the place called *Bencoolen* or *Fort Marlborough*, is a factory or settlement, but no military fort or fortress: that it was not established for a place of arms or defence against the attacks of an *European* enemy; but merely for the purpose of trade, and of defence against the natives: that the fort was only intended and built to keep off the country blacks: that the only security to *European* ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots: that the general state and condition of the said fort, and of the strength thereof, were in general well known by most persons conversant or acquainted with *Indian* affairs, of the state of the Company's factories or settlements; and could not keep secret or concealed from persons who should endeavour, by proper enquiry, to inform themselves: that there were no apprehensions or intelligence of any attack by the *French*, until they attacked *Nattal*, in *February* 1760: that on the 8th of *February* 1760, there was no suspicion of any design by the *French*: that the governor at that time bought of the witness goods to the value of 4000*l.* and had goods to the value of above 20,000*l.*, and then

then dealt for 50,000*l.* and upwards: that on the 1st of *April* 1760, the fort was attacked by a *French* man of war of 64 guns, and a frigate of 20 guns, under the *Compte D'Estaigne*, brought in by *Dutch* pilots, was unavoidably taken, and afterwards delivered to the *Dutch*, the prisoners being sent to *Batavia*. On the part of the defendant, after all the opportunities of enquiry, no evidence was offered that the *French* ever had any design upon *Fort Marlborough* before the end of *March* 1760, or that there was the least intelligence or alarm that they might make the attempt till the taking of *Nattal* in the year 1760. They did not offer to disprove the evidence, that the governor had acted, as in full security, long after the month of *September* 1759; and had turned his money into goods, so late as the 8th of *February* 1760. There was no attempt to shew that he had not lost by the capture very considerably beyond the value of his insurance. But the defendant relied upon a letter, written to the *East India* Company, bearing date the 16th of *September* 1759, which was sent to *England* by the *Pitt*, Captain *Wilson*, who arrived in *May* 1760, together with the instructions for insuring, and also a letter bearing date the 22d of *September* 1759, sent to the plaintiff by the same conveyance, and at the same time (which letters His Lordship repeated). They relied, too, upon the cross-examination of the broker who negociated the policy, that, *in his opinion*, these letters ought to have been produced, or the contents disclosed; and that, if they had, the policy would not have been underwritten. The defendant's counsel contended at the trial, as they have done upon this motion, that the policy was void: 1st, Because the state and condition of the fort, mentioned in the governor's letter to the *East India* Company was not disclosed. 2dly, Because he did not disclose that the *French*, not being in a condition to relieve their friends upon the coast, were most likely to make an attack upon this settlement, rather than remain idle. 3dly, That he had not disclosed his having received a letter of the 4th of *February* 1759; from which it seemed, that the *French* had a design to take this settlement by surprize the year before. They also contended, that the opinion of the broker was almost decisive. The whole was laid before the jury, who found for the plaintiff.

"Thirdly,

"Thirdly. It remains to consider these objections, and to examine whether this verdict is well founded. To this purpose, it is necessary to consider the nature of the contract at the time it was made. The policy was signed in *May* 1760. The contingency was, whether *Fort Marlborough* was or would be taken, by an *European* enemy, between *October* 1759 and *October* 1760. The computation of the risk depended upon the chance, whether any *European* power would attack the place by sea. If they did, it was incapable of resistance. The underwriter at *London*, in *May* 1760, could judge much better of the probability of the contingency than Governor *Carter* could at *Fort Marlborough* in *September* 1759. He knew the success of the operations of the war in *Europe*: he knew what naval force the *English* and *French* had sent to the *East Indies*. He knew, from a comparison of that force, whether the sea was open to any such attempt by the *French*. He knew, or might know, every thing which was known at *Fort Marlborough* in *September* 1759, of the general state of affairs in the *East Indies*, or the particular condition of *Fort Marlborough*, by the ship which brought the order for the insurance. He knew that ship must have brought many letters to the *East India* Company, and particularly from the governor. He knew what probability there was of the *Dutch* committing, or having committed, hostilities. Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an *European* power. If there had been any design on foot, or enterprize begun in *September* 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter, on account of his not being told of a particular design or attack then *subsisting*; and he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any design subsisting in *September* 1759. There was no such design in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the *Dutch*, which tempted *Compte D'Estaigne* to break his parole. These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealments. The first concealment is, that he did not disclose the

See Accord. Vallance v. Dewar. Sittings after Mich. 1808. 1 Campb. 503.

the condition of the place. The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistently with his duty. He knew the governor, by insuring, apprehended, at least, the possibility of an attack. With this knowledge, without asking a question, he underwrote. By so doing, he took the knowledge of the state of the place upon himself. It was a matter, as to which he might be informed various ways: it was not a matter within the private knowledge of the governor only. But not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner, as it is taken for granted, that a ship insured is sea-worthy. What is that condition? All the witnesses agree, that it was only to resist the natives, and not an *European* force. The policy insures against a total loss, taking for granted, that if the place was attacked, it would be lost. The contingency, therefore, which the underwriter has insured against, is, whether the place would be attacked by an *European* force; and not whether it would be able to resist such an attack, if the ships could get up the river. It was particularly left to the jury to consider, whether this was the contingency in the contemplation of the parties: they have found that it was. And we are all of opinion, that in this respect their conclusion is agreeable to the evidence. The state and condition of the place were material in this view only, in case of a land attack by the natives.

" The second concealment is, his not having disclosed that, from the *French* not being able to relieve their friends upon the coast, they might make them a visit. This is no part of the fact of the case; it is mere speculation of the governor, from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it, in this case, depended upon the *English* naval forces in those seas, of which the underwriter could better judge at *London* in *May* 1760, than the governor could at *Fort Marlborough*, in *September* 1759. The third concealment is, that he did not disclose the letter from Mr. *Winch* of

 the

the 4th of *February* 1759, mentioning the design of the *French* the year before. What that letter was; how he mentioned the design; or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose. The plaintiff offered to read the account *Winch* wrote to the *East India* Company, which was objected to; and therefore, it was not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the strongest light, it is a report of a design to surprise the year before; but then dropped. This is a topic of mere general speculation, which made no part of the fact of the case upon which the insurance was to be made. It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud. I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumstance: because it does not follow that they will cruise this year, at the same time, in the same place; or that they are in a condition to do it. If the circumstance of this *design laid aside* had been mentioned, it would have tended rather to lessen the risk, than increase it; for the design of a surprise, which has transpired, and been laid aside, is less likely to be taken up again; especially by a vanquished enemy. The jury considered the nature of the governor's silence as to these particulars; they thought it innocent, and that the omission to mention them, did not vary the contract. And we are all of opinion, that, in this respect, they judged extremely right. There is a silence, not objected to at the trial, nor upon this motion; which might, with as much reason, have been objected to, as the two last omissions; rather more. It appears by the governor's letter to the plaintiff, that he was principally apprehensive of a *Dutch* war. He certainly had, what he thought, good grounds for this apprehension. *Compte D'Estaigne* being pilotted by the *Dutch*, delivering the fort to the *Dutch*, and sending the prisoners to *Batavia*, is a confirmation of those grounds. Probably the loss of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots; and it is plain the whole was concerted with them. And yet, at the time of under-

underwriting the policy, there was no intimation about the *Dutch*. The reason why the counsel have not objected to his not disclosing the grounds of this apprehension is, because it must have arisen from political speculation and general intelligence: therefore, they agree, it is not necessary to communicate such things to an underwriter.

"Lastly. Great stress was laid upon the opinion of the broker. But we all think, the jury ought not to pay the least regard to it: it is mere opinion, which is not evidence: it is opinion after an event: it is opinion without the least foundation from any previous precedent or usage: it is an opinion, which, if rightly formed, could only be drawn from the same premises, from which the court and jury were to determine the cause: and therefore, it is improper and irrelevant in the mouth of a witness. There is no imputation upon the governor, as to any intention of fraud. By the same conveyance, which brought his orders to insure, he wrote to the company every thing, which he knew or suspected: he desired nothing to be kept a secret, which he wrote either to them or his brother. His subsequent conduct, down to the 8th of *February* 1760, shewed that he thought the danger very improbable. The reason of the rule against concealment is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail in the present instance, the rule would be turned into an instrument of fraud. The underwriter here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either, signed this policy without asking a question. If the objection, "that he was not told," is sufficient to vacate it, he took the premium, knowing the policy to be void, in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence, that if the worst should happen, he had provided against total ruin; knowing at the same time, that the indemnity, to which the governor trusted, was void. There was not a word said to him of the affairs of *India*, or the state of the war there, or the condition of *Fort Marlborough*. If he thought that omission an objection at the time, he ought not to have signed the policy, with a secret reserve

Freeland v. Glover, 7 East, 457.

reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then; he cannot take it up now, after the event. What has been often said of the statute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud, "that it should never "be so turned, construed, or used, as to protect, or be a "means of fraud." After the fullest deliberation, we are all clear that the verdict is well founded; and that there ought not to be a new trial: consequently, that the rule obtained for that purpose ought to be discharged."

To have given this very elaborate and learned argument in the state in which it was delivered, certainly requires no apology; because from it may be collected all the general principles upon which the doctrine of concealments, in matters of insurance, is founded, as well as all the exceptions, which can be made to the generality of those principles. To have abridged such an argument, would have very much lessened the pleasure of the reader, and would have been an injury to the venerable Judge, who in that form delivered the opinion of the Court. The rules, then advanced and illustrated, have since been confirmed by the opinion of the Judges upon similar questions.

The plaintiffs, *Planche* and *Jaquery*, merchants in *London*, insured goods, "on board the *Swedish* ship called the *Mary* "*Magdalena*, lost or not lost, at and from *London* and *Ramsgate* to *Nantz*, with liberty to call at *Ostend*, being a general "ship in the port of *London* for *Nantz*." There was a declaration in the policy, "that the insurance was made on account "of certain persons carrying on trade under the name and "firm of *Vallee* et *Duplessis*, Monsieur *Lassau le Jeune*, "*Guillaume Albert*, et *Potier de la Gueule*." The defendant underwrote the policy for 300*l*. at three guineas *per cent*. The ship's clearances from the custom-house in *London*, and other papers, were all made out for *Ostend* only, but the ship and goods were intended to go directly from *London* to *Nantz*, without going to *Ostend*. Bills of lading in the *French* language, dated the 18th of *July* 1778, were signed by the captain

Planche and another v. Fletcher, Dougl. 238.

captain in *London*, but purporting to be made at *Ostend*, and that the goods were shipped there to be delivered at *Nantz*. The policy was subscribed by the defendant on the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *August*. The proclamation for making reprisals on *French* ships, bore date the 29th, and appeared in the Gazette on the 31st of *July*. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas; one on the 31st of *July*, and the other on the 7th of *August*. The ship sailed on the 24th of *August*, and was taken by a king's cutter, on her way to *Nantz*. After her departure from *Gravesend*, the captain threw overboard all the papers which he had received from the custom-house at *London*. They had been obliterated by the custom-house officers at *Gravesend*, and were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiffs had no connection or share in the ship. Such were the material facts in this case, as they were stated this day by Lord *Mansfield* in his report, upon a rule to shew cause why there should not be a new trial. The cause had been tried at the last sittings at *Guildhall*, and a verdict found for the plaintiffs. The grounds for the application for a new trial were two: 1st, That there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, and yet never having been designed for that place. 2dly, That as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion, whether he would choose for a peace-premium to run the risk of capture. Beside the facts above-mentioned, His Lordship stated, that the plaintiff had produced evidence to shew, that all ships, going with goods of *British* manufacture to *France*, clear out for *Ostend*, without meaning to go thither; and that this is universally understood by persons concerned in that branch of commerce. The reasons suggested for clearing out for *Ostend*, and afterwards making bills of lading as from that place, were, that the light-house duties are saved, which are [illegible]able when the voyage is known to be directly down the [illegible]nnel: and that the *French* duties are less upon goods from [illegible]tend, than from *England*.

Sittings after Trin. 1779.

Lord

Lord *Mansfield.* — "This verdict is impeached upon two grounds. 1st, It is said there was a fraud on the underwriters, in clearing out the ship for *Ostend*, when she was never intended to go thither. But I think there was no fraud on them: perhaps not on any body. What had been practised in this case was proved to be the constant course of the trade; and notoriously so to every body. The reason for clearing for *Ostend*, and signing bills of lading as from thence, did not fully appear. But it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours; and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Ostend* duties, rather than stop the trade, by exacting a tax which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evasion of the light-house duties, the ship was not liable to confiscation on that account. 2dly, The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in *England* and *France*, on the 17th of *July*, expected the immediate commencement of a war. I will not say it was actually commenced; but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets were at sea; and, as it appeared afterwards, were waiting for each other to fight. It does not appear that the goods were *French* property; an *Englishman* might be sending his goods to *France* in a neutral ship. But it is indifferent whether they were *English* or *French*. The risk insured extends to all captures, and as two other underwriters signed at the same premium, after the proclamation, it appears that the war-risk was in view when the defendant signed. Shall he avail himself of an event, which increases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion, that there should not be a new trial." The three other judges concurred; and the rule was discharged.

So the Court have lately held, that where the object of the insurance was found by the jury to be meritorious, the policy was good, although in consequence of expected hostilities with Atkinson v. Abbott, 11 East, 135.

 Denmark,

Denmark, an order of the King in council had issued, prohibiting the clearing out of any *British* ship to a *Danish* port, and a *clearance* was consequently taken out for a neutral port in the neighbourhood, the adventure being legal, namely, to supply the *British* fleet with provisions, and not contravening the spirit of the order in council, which issued as a precautionary measure to prevent the vessels of this country from being detained in *Danish* ports in the event of hostilities. The false clearance, too, was strongly urged as an objection to the policy: but Lord *Ellenborough* and Mr. Justice *Le Blanc* both declared, that the mere circumstance of taking a clearance to a place, where a ship does not intend to go, does not make the voyage illegal, so as to vacate the policy. The stat. of 13 and 14 *Charles* 2. c. 11. s. 3. imposes a penalty of 100*l.* for taking out a false clearance, but does not render the voyage illegal. That was determined, said Lord *Ellenborough*, in *Planche* v. *Fletcher*, though the statute was not referred to.

Meyne v. Walter, B. R. East. 22 G. 3.

A similar decision was made in the following case. It was an action on a policy of insurance on a *Portugueze* ship, at and from *Madeira* to her port of discharge in *Jamaica*, with liberty to touch at the *Leeward Islands*. The defendant underwrote 150*l.* upon it: the ship was captured by a *French* privateer, and condemned in the Court of Admiralty in *France*, on the ground of having an *English supercargo* on board. The action was brought to recover this loss from the underwriter, who refused to pay, alleging that the plaintiff should have disclosed to him, that the supercargo was *English*. At the trial, a verdict was given for the plaintiff, upon a case reserved for the opinion of the Court, and containing in substance the facts just stated.

For the defendant it was insisted, upon the argument, that the agent for the insured ought to have disclosed this fact; and that it was the more material in this case, because during the present war an ordinance passed in *France*, similar to one made in the last war in 1756, which declares, that no *Dutch* ship shall be allowed to take on board a supercargo, belonging to any nation at enmity with the court of *France*: and that if any ship, having such supercargo, be taken, it shall be condemned as lawful prize.

Lord

Lord *Mansfield*.—" It is an oppressive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter must run all risks; and if the defendant knew of such an edict, it was his duty to enquire, if such a supercargo were on board. It must be a fraudulent concealment of circumstances, that will vitiate a policy. But it is remarkable, that neither party has said a word respecting the treaties between *France* and *Portugal*." Judgment was accordingly given for the plaintiff.

3d, We come now to the third great division of this chapter, namely, to cases in which policies are void by misrepresentation. Before we proceed to state the cases under this head, it will be proper to distinguish between a warranty and a representation. A warranty or condition is that which makes a part of the written policy, and must be literally and strictly performed; and being a part of the agreement, nothing *tantamount* will do, or answer the purpose. A representation is a state of the case, not a part of the written instrument, but collateral to it, and entirely independent of it (*a*); and it is sufficient, that a representation be substantially performed. The consequence of a breach of a warranty we shall take notice of hereafter. If there be a misrepresentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is absolutely necessary to make them a part of the instrument, by which the contract of indemnity is effected. If a representation be false in any material point, it will avoid the policy; and if the point be not material, the representation can hardly ever be fraudulent. The principle upon which the policy is void in such a case, we stated in the opening; that the underwriter has computed the risk upon circumstances, which were false, or which did not exist. These doctrines are fully established by a variety of judicial decisions.

Vide post. c. 18.

(*a*) Representation must always be of matter *collateral* to the contract, and not of matter directly contradicting the contract: for instance, if the contract is to sail on or before the 1st of *August*, evidence that the party wrote or said, that she would not sail till the 20th, cannot be received.— *Weston* v. *Gares*, 1 *Taunt*. 115.

Pawson v. Watson, Cowp. 785.

Upon a rule to shew cause why a new trial should not be granted in this case, Lord *Mansfield* reported as follows:— "This was an action upon a policy of insurance. At the trial it appeared in evidence, that the first underwriter had the following instruction shewn to him: "Three thousand "five hundred pounds upon the ship *Julius Cæsar*, for *Halifax*, "to touch at *Plymouth*, and any port in *America: she mounts "twelve guns and twenty men*." These instructions were not asked for, nor communicated to the defendant: but the ship was only represented *generally to him as a ship of force:* and a thousand pounds had been done, before the defendant underwrote any thing upon her. The instructions were dated the 28th of *June* 1776, and the ship sailed on the 23d of *July* 1776, and was taken by an *American* privateer. That at the time of her being taken, she had on board 6 *four-pounders*, 4 *three-pounders*, 3 *one-pounders*, 6 *half-pounders*, which are called *swivels*, and 27 men and boys in all for her crew; but of *them*, 16 only were *men*, (not 20, as the instructions mentioned,) and the rest boys. But the witness said, he considered her as being stronger with this force, than if she had 12 carriage guns and 20 men: he also said (which is a material circumstance), that *there were neither men nor guns on board at the time of the insurance*. That he himself insured at the same premium, without regard or enquiry into the force of the ship. Other underwriters also insured at the same premium, without any other representation than that she was *a ship of force*. That to every four-pounder there should be five men and a boy. That in merchant ships boys always go under the denomination of men. This was met by evidence on the part of the defendant, saying, that guns meant *carriage* guns, not *swivels*; and men meant *able men*, exclusive of *boys*. There were three causes of the same nature depending upon the same evidence. The defence in each was, that these instructions were to be considered as a warranty, the same as if they had been inserted in the policy; though they were not proved to have been shewn to any but the first underwriter. In all the three cases, the question for the Court to determine is, Whether the instructions, which were shewn to the first underwriter, are to be considered as a warranty inserted in the policy; or as a representation, which would avoid the policy, if fraudulent? If the Court should be of opinion,

opinion, that the instructions amounted to a warranty, then a new trial is to be had in each without costs; otherwise the verdicts, which were all for the plaintiffs, are to stand. At the trial I was of opinion, that it would be of very dangerous consequence to add a conversation, that passed at that time, as part of the written agreement. It is a collateral representation, and if the parties had considered it as a warranty, they would have had it inserted in the policy. But, secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent: and in that light, I held, that a misrepresentation made to the first underwriter ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: for where a good man stands first, the rest underwrite without asking a question: and if he be imposed upon, the rest of the underwriters are taken in by the same fraud." The case was left to the jury under that direction.

After argument at the bar, Lord *Mansfield* asked, Whether there was any case that made a difference between a written and a parol representation? No answer being given, His Lordship proceeded: "There is no distinction better known to those who are at all conversant in the law of insurance, than that which exists between a *warranty* or condition, which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed. As if there be a warranty of convoy, there it must be a *convoy*; nothing else will answer the idea intended by the warranty: it must be strictly performed, as being a part of the agreement; for in the case of convoy it might be said, the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there be fraud in a representation, it will avoid the policy, on account of the fraud, but not on account of the non-compliance with any part of the agreement. If in a life-policy, a man warrant another to be in good health, when he knows at the same time he is ill of a fever, *that* will not avoid the policy on the ground of misrepresentation, (though it will be void for non-compliance with

the warranty,) because, by the warranty, the insured takes the risk upon himself. But if there be no warranty, and he say, "the man is in good health," when in fact he knows him to be ill, it is *false*. So it is, if he do not know whether he be well or ill; for it is equally false to undertake to say that which he knows nothing at all of, as to say *that* is true which he knows is not true. But if he only say, "he believes the "man to be in good health," knowing nothing about it, nor having any reason to believe the contrary; there, though the person is not in good health, it will not avoid the policy, because the underwriter *then* takes the risk upon himself. So that there cannot be a clearer distinction than that which exists between a warranty, which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the usage being to consider instructions as a part of the policy, that parol instructions were never entered in a book, nor written instructions kept, till a few years ago, upon occasion of several actions brought by the insured upon policies, where the brokers had represented many things they ought not to have represented, in consequence of which the plaintiffs were cast. I advised the insured to bring an action against the brokers, which they did, and recovered in several instances: and I have repeatedly, at *Guildhall*, cautioned and recommended it to the brokers, to enter all representations made by them in a book. That advice has been followed in *London*; but it appeared lately, at the trial of a cause, that at *Bristol*, to this hour, they make no entry in their books, or keep any instructions. The question then is, Whether in this policy the person insuring has warranted that the ship should positively and literally have 12 *carriage guns and* 20 *men?* That is, whether the instructions given in evidence are a part of the policy? Now, I will take it by degrees. The two first underwriters before the Court are *Watson* and *Snell*. Says *Watson*, "It is "part of my agreement that the ship shall sail with 12 guns "and 20 men: and it is so stipulated, that nothing under "that number will do: 10 guns with swivels will not do." The answer to this is, read your agreement; read your policy. There is no such thing to be found there. It is replied, Yes, but in fact there is; for the instructions, upon which the po-

 licy

licy was made, contain that express stipulation. The answer again is, there never were any instructions shewn to *Watson*; nor were any asked for by him. What colour then has he to say that those instructions are any part of his agreement? It is said, he insured upon the credit of the first underwriter. A representation to the first underwriter has nothing to do with that, which is the agreement or terms of the policy. No man who underwrites a policy, subscribes by the act of underwriting, to terms of which he knows nothing: but he reads the agreement and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter, who is a good man, and to which another will therefore give faith and credit: but not to a collateral agreement, of which he can know nothing (*a*). The absurdity is too glaring, it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to a first underwriter, and makes a false representation to him in a point that is material; as where having notice of a ship being lost, he says she was safe; that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first. How then do *Watson* and *Snell* underwrite the ship in question? Without knowing whether she had any force at all. *That* proves the risk was equal to a ship of no force at all; and the premium was a vast one; eight guineas. So much therefore for those two cases. The third case is that of *Ewer*, who saw the instructions, with the representation which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have said, put them into the policy; warrant that the ship shall depart with 12 guns and 20 men. Whereas he does no such thing, but takes the same premium which *Watson* and *Snell* did, who had *no* notice of her having any force. What does that prove? That he is paid and receives a premium as if it were a ship of no

(*a*) This point, how far a representation made to the first underwriter shall be taken to extend to all the rest, was about to be discussed in a case of *Marsden* v. *Reid*, 3 *East's Rep.* 572. (See it for another point, *ante*, p. 45. and for another, *post.*) The facts did not sufficiently raise the question. But the Court seemed inclined to the affirmative; although the case had not proceeded far enough to require attention to Lord *Mansfield's* distinction.

force at all. The representation amounts to no more than this; I tell you what the force will be, because it is so much the better for you. There is no fraud in it, because it is a representation only of what, in the then state of the ship, they thought would be the truth. And in real truth the ship sailed with a larger force; for she had nine carriage guns and six swivels. The underwriters therefore had the advantage by the difference. There was no stipulation about what the weight of metal would be. All the witnesses say, that she had more force than if she had 12 carriage guns, in point of strength, of convenience, and for the purpose of resistance. The supercargo in particular says, "he insured the same ship "and the same voyage, for the same premium, without say-"ing a syllable about the force." Why then it was a matter proper for the jury to say, whether the representation was false, or whether it was in fact an insurance as of a ship without force. They have determined, and I think very rightly, that it was an insurance without force. *Ewer* makes an objection, that the representation ought to be considered as inserted in the policy; but the answer to that is, he has determined whether it should be inserted in the policy or not, by not inserting it himself. There is a great difference whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. *Thornton* has paid, who was the first person that saw the instructions. Shall the rest refuse then? As to *Watson* and *Snell*, they have no pretence to refuse; for there is not a colour for the objection made by them. As to *Ewer*, we are all satisfied with the determination of the jury against him. Therefore the rule for a new trial must be discharged."

N. B. On the *Monday* following Mr. *Davenport* said, he was desired by the underwriters to ask, Whether it was the opinion of the Court, that to make written instructions valid and binding as a warranty they must be inserted in the policy? Lord *Mansfield* answered, that most undoubtedly that was the opinion of the Court: if a man warrant that a ship shall depart with 12 guns, and it depart with 10 only, it is contrary to the condition of the policy.

From

From the judgment pronounced in the cause just stated, we learn the difference between a warranty and a representation: we learn also, that a performance in substance will satisfy a condition expressed in a representation: but that nothing except a strict and literal compliance will fulfil the terms of the former: and we also are instructed in the whole doctrine of representation, as far as it affects the contract of insurance. The positions advanced in the above case were so satisfactory, that they have been adopted, as the ground of direction to juries, upon all questions of representation; and have been followed by the Court, whenever points of that nature have come before them for judgment.

Bize v. Fletcher, Sittings after East. Term 1779, Guildhall. Dougl. Rep. 271.

This was an action on a policy of insurance on the ship *Carnatic, East Indiaman,* "at and from *Port L'Orient* to the "isles of *France* and *Bourbon,* and to all or any ports or "places, where and whatsoever, in the *East Indies, China,* "*Persia,* or elsewhere, beyond the *Cape of Good Hope,* from "place to place; and during the ship's stay and trade back-"wards and forwards, at all ports and places, and until her "safe arrival back at her last port of discharge in *France.*" But at the same time that this policy was subscribed, there was a slip of paper wafered to it, and shewn to the underwriters, on which was written the following representation: "The ship has had a complete repair, and is now a fine and "good vessel, three decks. Intends to sail in *September* or "*October* next (1776). Is to go to *Madeira,* the isles of "*France, Pondicherry, China,* the isles of *France,* and "*L'Orient.*"

The ship did not sail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *August* following, when, instead of proceeding to *China,* she sailed for *Bengal,* where having passed the winter and undergone considerable repairs, she sailed from thence early in the year 1778, (being the second ship that left the *Ganges*) returned to *Pondicherry,* and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient,* but was taken in *October* in that year, by the *Mentor* privateer. The usual time in which the direct voyage between *Pondicherry* and *Bengal* is performed,

is

is six or seven days; but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off *Madras*, *Masulipatam*, *Visigapatam*, and *Yanon*, and took in goods at all those places.

It was contended in this cause, at the trial, that the representation accompanying the policy restrained the voyage to the limits therein specified. They produced some letters from the owners to their correspondents, one of which was to the following effect: "We doubt not, but on account of the storm "the ship will be forced to go to *Bengal* to be laid down, "which cannot be done at *Pondicherry*; in which case our "captain will have entered a protest, which we will forward "in time to you." In a subsequent letter they say nothing of the storm or leak; but mention a different cause for the ship's going to *Bengal*. These letters, it was said, raised a presumption that the necessity of going to *Bengal* was merely a pretence devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord *Mansfield* told the jury, "that the first question was, Whether the policy was void, on account of misrepresentation? Now there is an essential difference between a warranty and a representation. The warranty is a part of the contract: a risk described in the policy is part of the contract. There can be no warranty by any collateral representation. The ground, on which a representation affects a policy, is fraud, the representation must be fraudulent, that is, it must be false and material in respect to the risk to be run. All risks are governed by the nature of them: and the premium is governed by the risk. Where a representation accompanies an instrument, it says, "I will have this understood as my present intention: but I will have it in my power to vary it." The great question in this cause is, Whether the representation was false, and that in a material instance? Fraud is found out by the materiality of the point it is charged in. It is to be considered, then, whether they had really a view of going to *China*. A witness has proved that the difference of insurance is one *per cent.* on going to *Bengal*, and not to *China*. If you think that this

this was a misrepresentation to avoid paying the *one per cent.* you will find for the defendant. But if you are satisfied that the real intention, at the time of the representation, was to go to *China*, the plaintiff will be entitled to your verdict: for the insured may change his intention, go to *Bengal*, and yet be protected by the policy, which clearly admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. If, upon the whole evidence, you shall be of opinion, that no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the underwriters, *this slip of paper being only a representation*, you must find for the plaintiff." The jury found a verdict accordingly. And although in several causes upon the same ship, new trials were moved for, and granted; yet in this, which was the only cause in which there was a representation, the verdict was acquiesced in, and no motion respecting it ever was made. Vide Dougl. Rep. 271.

In the outset of this chapter, we took notice of a very material rule respecting misrepresentation; and which it now becomes necessary to repeat. If a representation be made to the underwriter of any circumstance which was false, this, if it be in a material point, shall vacate the policy, and annul the contract, *although it happened by mistake*, and without any fraudulent intention or improper motive on the part of the insured. We also stated the principle, on which, in such a case, the contract is held to be void: because the insurer is led into error, and computes his risk upon circumstances not founded in fact; by which means the risk actually run is different from that intended to be run, at the time the contract is made. On this ground it is, that the contract is as much at an end, as if there had been a wilful and false allegation, or an undue concealment of circumstances. The doctrine here meant to be advanced will be better understood, and more fully illustrated, by attention to the following case: 5 Burr. 1909.

It was an action on a policy of insurance on the ship, "the *Mary* and *Hannah*, from *New York* to *Philadelphia*." At the time Macdowall v. Fraser, Dougl. 247. 260.

time when the insurance was made, which was in *London*, on the 30th of *January*, the broker represented the situation of the ship to the underwriter as follows: "The *Mary* and *Hannah*, " a tight vessel, sailed with several armed ships, and was seen " safe in the *Delaware on the 11th of December*, by a ship " which arrived at *New York*." In fact the ship was lost *on the 9th of December*, by running against a *cheveau de frise*, placed across the river. The cause came on to be tried before Lord *Mansfield* at *Guildhall*. The defence was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. A rule was obtained on the part of the plaintiff, calling upon the defendant to shew cause why there should not be a new trial. After argument at the bar,

Lord *Mansfield* said:—" The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and if he represents facts to the underwriter, without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material. The case of the *Julius Cæsar* was very different from this. The ship there was only fitted out, when the insurance was made. No guns nor men were put on board. It was only said, what was meant to be done; and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of *actual fraud* in the present case, and no question of that sort seemed to be made. But there was a positive averment, that the ship was seen in the *Delaware* on the 11th of *December*. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial *when* she was seen in the *Delaware*, or in what condition: but suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances on ships at a great distance, their being safe up to a certain day is always considered as a very important circum-

Vide ante, the case of Pawson v. Watson, p. 308.

 stance.

stance. I am of opinion, that the representation concerning the day was material."

Mr. Justice *Willes*. — "This is certainly only a representation: but, in an insurance on so short a voyage, it might have made a material difference whether the ship was known to be safe two days sooner or later. It ought to have been shewn, on the part of the plaintiff, that it was not material, but there was no evidence that the ship was met on the 9th, or any other day. The materiality was proper for the consideration of the jury.

Mr. Justice *Ashhurst*. — "The distinction which the Court has made in the cases on the *Julius Cæsar*, and some others, between a representation and a warranty, is extremely just. There is *no imputation of fraud* in this case; but the insured should have been more cautious. In the former cases, the representation was of what was intended; here it was of a fact stated as having happened, within the knowledge of the insured. He should have made the representation in the same words in which the intelligence is said to have been communicated to him."

Mr. Justice *Buller*.— "We cannot say the difference of the day was not material. The safety of the ship is the most material fact of any, in cases of insurance. The plaintiff admits that the place where she was met in safety, was material. Why was not the time equally so? There was no *intentional deceit*, and it is perhaps unfortunate that the insured made *the mistake*; but I think the verdict right."

A similar decision was made by the same learned judges at a period subsequent to that of the case of *Macdowall* and *Fraser*. Shirley v. Wilkinson. B. R. Mich. 22 Geo. 3. Dougl. Rep. 306.

Upon a motion for a new trial, Lord *Mansfield* and the rest of the Court were clearly of opinion, that if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship, and the last intelligence concerning her, does not disclose the whole, and what he

he *conceals* shall appear *material* to the jury, they ought to find for the underwriter, the contract in such case being void; although the concealment should have been *innocent*, the facts not mentioned having appeared *immaterial* to the broker, and having not been communicated merely on that account.

But as has been said before, and as will appear from the cases already cited, in order to vitiate the contract, the thing concealed must be *material*, it must be *some fact*, and not merely a supposition or speculation of the insured; and the underwriter must take advantage of any misrepresentation the first opportunity, otherwise he will not be allowed to claim any benefit from it at a future period. If therefore the insured merely represent that he expects a thing to be done, the contract will not be void, although the event should turn out very different from his expectation.

Barber v. Fletcher, Dougl. 292.

Thus upon a motion for a new trial, one of the grounds stated to induce the Court to grant it, was, that since the trial, a material representation, which had been made to *Shulbred*, the first underwriter upon the policy, and which turned out to be false, had been discovered. *Shulbred* made an affidavit, by which it appeared, that when he signed the policy in *March* 1778, the broker was getting several others, on other ships, subscribed at the same time, all belonging to the same owner, and said, speaking of them all, "which vessels are *expected* to leave the coast of *Africa* in *November* or *December* 1777." In truth, the vessel in question had sailed in *May* 1777, and *Shulbred* swore, that if he had known that circumstance, he would not have signed. There had been actions brought against all the underwriters on the policy, except *Shulbred*.

Lord *Mansfield*.—"It has certainly been determined in a variety of cases, that a representation to the first underwriter extends to the others. But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself. He was acquainted with *Shulbred*, and had an opportunity of asking before the trial what had been represented to *him*. If therefore this evidence is *new*, it is owing to his own negligence. But the repre-

representation is not material: it was only an *expectation*, and the underwriters did not enquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff."— The rule was discharged.

There is another rule upon this subject, which it is material *particularly* to mention; although it may be collected from almost all the cases that have already been quoted: and it is applicable to each of the three branches, into which this chapter has been divided. Wherever there has been an allegation of a falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial, whether such allegation or concealment be the act of the person himself who is interested, or of his agent; for in either case, the contract is founded in deception, and the policy is consequently void. The reason of this rule is nothing more than that which the law of *England* has for general convenience adopted, in treating of the relation between master and servant; declaring, that the master must always be responsible for the act of his servant, if done by his *express* or *implied* command. It would indeed be of very mischievous consequence, if a man might shelter himself from responsibility of any kind, by throwing the blame upon his agent: it would be to allow him to contradict a maxim of law, which says, that no man shall be suffered to make any advantage of his own wrong: and would overturn that wise principle of equity, that when one of two innocent persons (for the master may without danger to the argument be supposed innocent) must suffer for the fraud or negligence of a third, he who gave credit to that third person, shall bear the consequences arising from the confidence so reposed. If this be true, and it cannot be denied, of contracts in general, it must also be admitted in those of insurance, where, from the very nature of the case, the business is seldom transacted by the parties themselves; but is most commonly effected by the interposition of agents or brokers. The courts of justice have accordingly held, that any fraud in the agent of the insured vitiates and annuls the contract, as much as direct fraud in the insured himself: and this, although the act cannot be traced at all to the owner of the property; or even though he should be perfectly innocent.

In

Stewart and others v. Dunlop and others, H. Lords, det. April 8. 1785.

In a case before the House of Lords, so late as the year 1785, this doctrine was confirmed. It came before the House on an appeal from the Court of Session in *Scotland*, which had determined in favour of the respondents, the underwriters. The case was shortly this:—A man having arrived at *Greenock*, knowing of the loss of the ship insured, and meeting a friend and intimate acquaintance of the insured, and a partner with him in some other adventures, communicated the intelligence of the loss of the ship to him, *who desired it might be concealed.* The same day, as appears by the evidence, the person who had received this information held a conversation with the plaintiff's clerk, who made this deposition, "that neither at that time, nor at any other time of the said "day, had he any conversation whatever with the said Mr. "*Boog*, or message from him, either in writing or otherwise, "relative to the *Peggy* (the ship insured), nor did he get *any* "*hint* from him or any other person, relative to the making "insurance upon her, further than the said Mr. *Boog's ask-* "*ing the deponent if he knew whether there was any insurance* "*made upon her*, and if there was any account of her." After this conversation the plaintiff desired the clerk to write to get an insurance effected, which he did, without stating a word (at least it did not appear that he stated any) of this conversation to his master. Upon the whole of the evidence in this cause, although it did not appear by any deposition that the plaintiff knew of the loss of the ship at the time he made the insurance, the Lords of Session decreed, "that the "insurance made by the plaintiff would not have been made, "if the brigantine *Henrietta* had not arrived in the road of "*Greenock* the day preceding, and brought intelligence that "the ship *Peggy* was taken; and therefore that the policy "was void." The House of Lords confirmed this decree.

In the decisions of the House of Lords, the reasons of the judgment never appear: and even when the learned Judges give their opinions upon any cause then depending in that House, authentic reports of them are not easily obtained: the consequence of this is, that one is frequently left to conjecture upon what grounds the decree was pronounced. If we may be allowed to conjecture upon the case of *Stewart* v. *Dunlop*, it should

should seem, that as no direct or positive act of knowledge was brought home to the plaintiff himself, the conversation which the clerk had with Mr. *Boog* was held to be a sufficient proof that the loss was known to him, at the time he wrote the letter, at the desire of the plaintiff, ordering the insurance. If known to the clerk, the act of the agent in such a case becomes the act of the principal; because the law, upon general reasons of policy, will presume, that the principal must know whatever has come to the knowledge of the agent.

But in the end of the same year, a cause was decided in the King's Bench, expressly upon the point of fraud in the agent; for it appeared that the insured was not guilty of any improper conduct in the transaction. In that case the circumstances were numerous; and the judges gave their opinions *seriatim* upon the question.

It was an action on a policy of insurance for 110*l.* underwritten by the defendant on the 21st of *September* 1782, at six guineas *per cent.* on a cargo of oats on board the ship *Joseph*, lost or not lost, at and from *Hartland* to *Portsmouth*, beginning the adventure from the loading thereof on board the said ship at *Hartland*. The defendant pleaded the general issue, and paid the premium into Court. This cause came on to be tried before Mr. Justice *Buller* at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: Fitzherbert v. Mather, 1 Term Rep p. 12.

That on the 27th of *July* 1782, *William Bundock*, of *Pool*, agent for the plaintiff, contracted with *Richard Thomas* of *Hartland*, a corn factor, for the purchase of 500 quarters of oats, to be consigned to *William Fuller* at *Portsmouth*, on plaintiff's account; and desired *Thomas* to send him (*Bundock*) a bill of lading and invoice, and also a like bill of lading and invoice to the plaintiff at Mr. *Fisher*'s at the *Tower*, *London*. That in pursuance thereof, *Thomas* shipped the oats on board the ship insured, which sailed from *Hartland on the* 16*th of September* 1782, and was lost *the same day* off the pier of *Hartland*. That on *the* 16*th of September*, 1782, *Thomas* wrote the two following letters to *William Bundock* and to *Fisher*.

To Mr. WILLIAM BUNDOCK.

Sir, *Hartland, Sept.* 16. 1782.

This morning I loaded the *Joseph* with 175 quarters of oats to the address of *William Fuller, Portsmouth, and the sloop sailed immediately*; but I am afraid the wind is coming to the westward, and will force her back. I have sent a bill of loading, and a letter by the master to Mr. *Fuller:* and also a bill of loading, and advice to Mr. *Fisher*, that *he may insure*, if he likes, as the equinox is near, &c. R. THOMAS.

To CUTHBERT FISHER, Esq.

Sir, *Hartland, Sept.* 16. 1782.

By an order from Mr. *William Bundock* of *Pool*, I shipped this day on board the *Joseph*, which immediately set sail for *Portsmouth*, a cargo of oats as under; and by the same order *as well as the order of Thomas Fitzherbert*, Esq. I took the liberty of drawing on you at three days' sight, in favour of Messrs. *Scott* and *Willis*, or order, 106*l.* to be placed to the account of *Thomas Fitzherbert*, Esq. *I wish the whole safe to hand*, and expect another vessel to be loaded this week, weather permitting: this evening appears stormy.

R. THOMAS.

Then follows the bill of lading. The case further states, that about *six* or *seven* o'clock of *the evening of the* 16*th of* September, Thomas *heard a report that the ship was on shore; and at six o'clock in the morning of the* 17th *he knew the ship was lost.* That the mode of sending letters from *Hartland* to *London* is as follows: the letters are collected by a private hand about one or two o'clock of the day on which the post sets out from *Biddeford*, from which place it goes about nine o'clock in the evening. That the 16th of *September* was not a post day; *and the above letters did not leave* Hartland *till one o'clock in the afternoon of the* 17*th*, which was the post day from *Biddeford* to *London:* and the letters which went from *Biddeford* by the post of that evening, were received in *London* on the 20th of *September.* That on the 19th, the plaintiff wrote the following letter to *Fisher:*

Stubb-

Stubb-Lodge, Portsmouth, Sept. 19. 1782.

Dear *Fisher*,

My correspondent, Mr. *Bundock*, having informed me, that he has sent two sloops to *Hartland* in *Devonshire*, to load oats on my account and risk, I beg the favour of you to insure my amount of the cargoes to *Portsmouth*, as soon as the bills are sent you. T. FITZHERBERT.

That the last-mentioned letter, together with the former from *Thomas*, dated *September* 16th, were received by *Fisher* in *London*, on the 20th of *September*; and he thereupon directed the insurance in question to be effected: that on the 21st, defendant subscribed the policy. Upon this case, after argument at the bar,

Lord *Mansfield* said:—"This policy is effected by misrepresentation, and that misrepresentation arises *from the proper agent* of the plaintiff who gives the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case, the policy is void. As to the misrepresentation, the underwriter was warranted on the information of the agent to take for granted that the ship was safe at 12 or 1 o'clock of the 17th of *September*; for the agent gives an account of the ship being loaded, and says, "I wish the whole safe to hand." Then there was a strong ground to believe on his letter, that she was safe when the post came away; and the post-mark shews the day when the letters were sent. How does this misrepresentation come? Why from *Thomas*, who writes to *Fisher*, and gives him notice of the ship's sailing, on purpose that he may insure; for so he says expressly in his letter to *Bundock*. He was honest at the time he wrote the letter; but on the 16th, at night, he hears that the ship is gone ashore, and the next morning he knew that she was absolutely lost. The post did not go out till the afternoon of that day; and he had full opportunity to send an account of the loss. If *Thomas* were not guilty of fraud, at least he was guilty of gross negligence: but either way, if *Thomas* were perfectly innocent, this policy, being effected by misrepresentation, is void."

Mr. Justice *Willes*. — "*Thomas* is most clearly to be considered as the agent of the plaintiff. He shews by his letter to *Fisher*, that he acts as well by the orders of *Fitzherbert* as of *Bundock*. If then *Thomas* be the agent of the plaintiff, he is most certainly liable for his misrepresentation; and in this case the misrepresentation is gross."

Mr. Justice *Ashhurst*. — "On principles of policy, it is necessary that a man should be answerable for the acts of his agent. It is often difficult to prove the privity of knowledge; and therefore the law will presume, that facts known to the one, are also within the knowledge of the other. Nor is there any hardship on the plaintiff; for if this fact had been known, the policy could not have been effected."

Mr. Justice *Buller*. — "In order to shew that *Thomas* was not the agent of the plaintiff, the counsel has assumed a fact, which is contrary to the case; for it is said, that the insurance was not made in consequence of *Thomas's* letter. But what is the fact? The plaintiff's letter to *Fisher* desires him to insure, as soon as the bills of lading are sent. By whom were they to be sent? By *Thomas*; then he refers to *Thomas* for all the information, and as the foundation of the insurance. The plaintiff, I dare say, is innocent; and so is the defendant. But if the plaintiff build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at *Guildhall*, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. In this case, the plaintiff trusted; not the defendant: *Thomas* had very material information, which he did not communicate; the consequence of which is, that the policy is void, and the *postea* must be delivered to the defendant."

From these cases, the principle, which we sought to establish, is evident, *viz.* that whether the fraud or misrepresentation be the act of the insured, or of his agent, the policy is void, and the contract between the parties is vacated and annulled.

To have troubled the reader with all the cases that have

 come

come to trial upon the ground of fraud, would have swelled this chapter to the size of a volume; and at the same time would be wholly unnecessary, as every case of fraud must depend upon its own circumstances. It was thought sufficient to lay down the general principles, which the Courts have adopted upon the subject, and which are applicable to each division of it as stated in the beginning of this chapter; and to cite two or three cases under each head, in order to confirm and illustrate the positions and principles advanced.

But as fraud is a charge of a very serious nature, materially affecting a man's credit, character, and reputation, the law of *England* will never presume that any one is guilty of it; nor set aside a contract on that ground, unless it be *fully and satisfactorily* proved. The consequence of this favourable presumption is, that the burden of proof lies upon the person who wishes to avail himself of the fraudulent conduct imputed. Thus, if the insured is supposed to be guilty of fraud, the proof of it falls upon the underwriter; because he is the person who is to derive a benefit from substantiating the charge. This is not only the law of *England*, but the law of common sense, founded on principles of equity and justice. Roccus, Not. 51. 78. Although it has been said, that fraud will not be presumed, unless it be *fully and satisfactorily proved*, it is not intended to convey an idea, that there must be a *positive* and *direct* proof of fraud, in order to annul the contract. The nature of the thing itself, which is generally carried on in a secret and clandestine manner, does not admit of such evidence; and therefore, if no proof but that of actual fraud were allowed in such cases, much mischief and villany would ensue, and pass with impunity. Circumstantial evidence is all that can be expected; and indeed all that is necessary to substantiate such a charge. The prejudice entertained against receiving circumstantial evidence, is carried to a pitch wholly inexcusable. In the case before us, we have already shewn, it must be received; because the nature of the enquiry for the most part admits of no other, and consequently it is the best possible evidence that can be given. But taking it in a more general sense, a concurrence of circumstances (which we must always suppose to be properly authenticated, otherwise they

 weigh

weigh nothing) forms a stronger ground of belief, than positive and direct testimony generally affords; especially when unconfirmed by circumstances. The reason of this is obvious: a positive allegation may be founded in mistake, or what is too common, in the perjury of the witness: but circumstances cannot lie, and a long chain of well-connected fabricated circumstances, requires an ingenuity and skill rarely to be met with; and such a consistency in those who come to support those circumstances, by their oaths, as the annals of our courts of justice can seldom produce. Besides, circumstantial evidence is much more easily discussed, and much more easily contradicted by testimony, if false, than the positive and direct allegation of a fact, which, being confined to the knowledge of an individual, cannot possibly be the subject of contradiction founded merely on presumption and probability.

Another question upon this subject remains to be discussed; and that is, whether the underwriter is bound to return the premium, or is liable to an action for it, in a case where fraud has been proved against the insured; and consequently where the contract is void, and no risk has been run. The ordinances of *France* declare, that if fraud be proved against the insured, he shall be obliged to restore to the insurer that which he has received from him, and also to pay him double the premium: and if fraud be proved against the insurer, he shall in like manner be liable to restore the premium, and to pay double the sum insured to the owner of the property. A learned commentator upon these ordinances observes, that if this article suppose a full conviction of the crime, the punishment is too small; and that here the punishment of the assurer and assured is nearly equal, although the crime of the assured is much greater, when the difference between the premium and the value of the property is considered. Indeed, the idea of enriching one man by the punishment of another is itself a strange one; and somewhat inconsistent with the present notions of criminal justice. The ground upon which it has been introduced into the edicts of *France* upon insurances, must have been this, that as the insurer in one case, and the insured in the other, runs a considerable risk by fraudulent allegations or concealments, they shall severally be entitled to

Ord. of Lew. 14. tit. Ins. art. 41.

2 Valin, 96.

the sums stated in the ordinance, as a recompense for the risk they so incurred.

The law of *England* was for a long time silent upon this subject, there being no positive declaration of the legislature respecting it: and our courts of justice had not till lately adopted any general rule, with respect to the return of premium in cases of fraud. In two or three instances in the Court of Chancery, where the underwriters have been relieved from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned.

Thus in a case in the year 1690, the defendant and others had come to the insurance office, and bought a policy for insuring the life of one *Horwell* (upon whose life they had no concern or interest depending) for a year; and the policy ran whether interested or not interested, at a premium of 5*l.* *per cent.* They took this way of drawing in subscribers: they agreed with one *Marwood*, a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case *Horwell* died within the year, *Marwood* was to lose nothing, but on the contrary was to share what should be gained from the other subscribers. Upon the credit of *Marwood's* subscribing, several others (who had enquired of *Marwood* about *Horwell*, who was his neighbour) subscribed likewise. *Horwell* lived about four months, and then died; and this bill was brought to be relieved against the policy: and this matter being all confessed by the answer, the Court decreed the policy to be delivered up, *and the premium to be repaid.*

Whittingham v. Thornborough, Precedents in Chancery, p. 20. and 2 Vern. 206.

So also in the case of *Da Costa* v. *Scandret*, which has already been cited in a former part of this chapter, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the insured.

Da Costa v. Scandrte, 2 P. Wms. 170. Vide ante, p. 288.

It is true, that during the argument in the case next to be quoted, the counsel cited a case of *Racker* v. *Hollingbury*, in which the Master of the Rolls had been of a different opinion from that delivered in the two preceding cases. But Lord

Mansfield said, that there must be some mistake in reciting the case before the Master of the Rolls: for the practice of the Court of Chancery was certainly agreeable to the two former cases.

Wilson v. Duckett, 3 Burr. 1361.

The case, in which this observation was made, was an action on a policy of insurance on a ship, with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use: and damages were laid at 98*l.* The trial was had, under a decree of the Court of Chancery, where the now defendant the insurer, being there complainant, *had offered to pay back the premium, which was* 10*l.* No money was, in the present case, paid into Court, though the usual course in these cases is for the defendant, the insurer, to bring the premium into Court. The jury found a verdict for the plaintiff, for the ten pounds' premium, on the count for money had and received to his use, although they were of opinion against the policy, upon the foot of fraud; and found against it, as being fraudulent. In fact, the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, that he should not be bound by signing the policy; which this Court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield* (before whom this cause was tried) and of the counsel on both sides, it was agreed to bring this question before the Court, whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff (the insured), or retained by the defendant (the insurer). The cases above-mentioned were quoted by the counsel for the plaintiff; but they being all in Chancery, Lord *Mansfield* said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, His Lordship said, It was plain what must be done in this case; for he looked upon *the offer made* by the complainant's bill in equity, to be the same thing as if the money had *actually been brought into Court* in the present case.

But although the common law has been so silent upon the subject, as not to lay down any general rule; and although in

in all the cases stated the premium was restored, yet if the fraud is notorious, palpable, and gross in its nature the Court may order, and has ordered, the underwriter to retain the premium.

Thus where an action was brought by the insured to recover 150*l.* being the amount of the defendant's subscription, the ground of refusal was, that the insurance was fraudulent; and that the plaintiff knew of the loss of the ship at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one now in dispute; but contended that the news of the loss of the ship had not arrived till after this particular one was effected. The evidence, however, was so strong as easily to convince the jury, that the plaintiff had received information of the loss before the order for making the insurance was given to the broker; and they found a verdict for the defendant.

Tyler v. Horne, Sittings at Guildhall after Hil. T. 1785.

Lord *Mansfield* said,—The fraud was so gross, that the premium should not be recovered from the underwriter.

At last this great question came to be expressly decided, where the agent of the assured only had been the guilty person; and the whole Court of King's Bench were of opinion, that in all cases of *actual* fraud on the part of the assured or his agent, the underwriter might retain the premium. (*a*)

Chapman and others, Assignees of Kennet, v. Fraser, B. R. Trin. 33 G. 3.

If a policy be avoided on account of a misrepresentation, made without *any fraud*, the assured is entitled to a return of premium.

Feise v. Parkinson, 4 Taunt. 640.

It is proper also here to observe, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. Thus it was said by Lord *Mansfield*, in the case of *Carter* v. *Boehm*, which has already been quoted at large in this chapter:—" The policy would be void against the

3 Burr. 1909.

(*a*) See post. ch. 19. where the question of return of premium on insurances illegal and void is discussed.

" under-

" underwriter, if he concealed any thing; as, if he insured a " ship on her voyage, which he privately knew to be arrived; " and *an action would lie to recover the premium.*"

Ord of Amsterdam, art. 56. 2 Mag. 146. By several of the foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe. By those of *Amsterdam* it is declared, " That as contracts of in-" surance are contracts of good faith, wherein no fraud or " deceit ought to take place, in case it be found, that the in-" sured or insurers, captains, shippers, pilots, or others used " fraud, deceit, or craft, they shall not only forfeit by their " deceit and craft, but shall also be liable to the loss and da-" mage occasioned thereby, and be corporally punished for a " terror and example to others, *even with death*, as pirates " and manifest thieves, if it be found that they have used no-" torious malversation or craft." The ordinances of *Middleburg* contain a provision exactly in the same words. At *Stockholm* also it has been declared, that such an offender, be- (Art. 30. 2 Mag. 76. 2 Mag. 288.) sides restitution to the party injured, shall, according to the circumstances of every particular affair, be punished in his estate, honour, and life.

Frauds in contracts of insurances have not as yet had any punishment affixed to them by the laws of *England*, that I have been able to learn; but there are one or two cases which have been declared to be felonies by positive statutes, where the act committed has been to the prejudice of the underwriters.

1 Ann. st. 2. c. 9. s. 4. By a statute in the reign of Queen *Anne*, it was enacted, that if any captain, master, mariner, or other officer, belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, (or by a subsequent statute, to the prejudice of any (4 Geo. 1. c. 12. s. 3.) person or persons that shall underwrite any policy or policies of insurance thereon,) he shall suffer death as a felon; and the benefit of clergy is taken away from this offence by 11 *Geo.* 1. c. 29.

These

These acts being found ineffectual, a subsequent statute has repealed most of these provisions, and has declared, that if any person shall wilfully cast away, burn, or otherwise destroy any ship or vessel, or in anywise counsel, direct, or procure the same to be done, and the same accordingly be done, with intent thereby wilfully and maliciously to prejudice any owner of such ship, or any owner of goods laden thereon, or any person or body corporate, that hath underwritten on the said ship, freight, or cargo, the person so offending shall suffer death as a felon without clergy. 43 G. 3. ch. 113. s. 1 & 2.

And sect. 3. directs the mode of trial, either in the County or in the Admiralty.

And sect. 5. directs the proceedings against accessories to these offences.

These are the only provisions which the legislature of this country has, as yet, thought proper to make for the prevention of crimes of this enormity: but as the records of our courts of justice evidently prove that frauds are too frequent in policies of insurance, greater severity than merely annulling the contract seems necessary, in order to put a stop to such offences.

CHAPTER XI.

Of Sea-worthiness.

HAVING in the preceding chapter treated very fully of the influence which fraud has upon the contract of insurance; we proceed to shew, that other circumstances, in which no fraud whatever can be discovered, or even suspected, will also vitiate and annul the policy. Of this nature is the doctrine of Sea-worthiness. Upon this point it has been determined, that every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect wholly unknown to the parties, that will vacate the contract; and the insurers are discharged. This doctrine is founded upon that general principle of insurance law, that the insurers shall not be responsible for any loss arising from the insufficient or defective quality or condition of the thing insured.

There is in the contract of insurance a tacit and implied agreement that every thing shall be in that state and condition, in which it ought to be: and therefore it is not sufficient for the insured to say, that he did not know that the ship was not sea-worthy; for he *ought* to know that she was so, at the time he made the insurance. The ship is the *substratum* of the contract between the parties; a ship not capable of performing the voyage is the same, as if there were no ship at all; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter; because such a defect is not the consequence of any external misfortune, or any unavoidable accident, arising from the perils of the sea, or any other risk, against which the underwriter engages to indemnify the person insured. To support a contrary doctrine

trine would introduce a variety of frauds, as it would probably subject the underwriter to account for the loss, diminution, or waste, which may happen from the necessary and ordinary use of the thing insured; or the wear and tear of the ship in the common course of the voyage: and all of these are risks, to which the insurer has never been considered as exposed. From what has been said it appears, that the ground of decision in this case is perfectly distinct from any principle of fraud: that it depends merely upon this, that the insured is presumed to be better acquainted with the state and condition of his ship than any other man; and that he has tacitly undertaken, that she is in a condition to perform the destined voyage. In the cause of *Carter* v. *Boehm*, which was decided in *Easter* term 1766, Lord *Mansfield*, in discoursing upon the case then before him, affirms the law respecting the necessity of a ship being sea-worthy when she is insured: for he says,—"The utmost that can be contended "for is, that the underwriter trusted to the *fort* being in the "condition in which *it ought* to be; *in like manner as it is* "*taken for granted, that a ship insured is sea-worthy.*" But although the insured ought to know whether his ship was sea-worthy or not at the time she set out upon her voyage; yet he may not be able to know the condition she may be in, after she is out a twelvemonth: and therefore, whenever it can be made appear, that the decay, to which the loss is attributable, did not commence till a period subsequent to the insurance, as she was sea-worthy at the time, the underwriter, it is presumed, would be liable. Indeed, in a late case upon another point, but where the same principle was much relied upon, Lord *Mansfield* said,—"By an implied warranty every "ship insured must be tight, staunch, and strong: but it is "sufficient if she be so at the time of her sailing. She may "cease to be so in twenty-four hours after departure, and "yet the underwriter will continue liable (*a*)." Every case of

3 Burr. 1913.

5 Burr. 2804.

Eden v. Parkinson, Dougl. 732.

(*a*) But if a ship sail upon a voyage, and in a day or two become leaky, and founder, or is obliged to return to port without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not sea-worthy when she sailed; and the jury upon the plaintiff's own case, may draw such a conclusion. The principles of law, applicable to the implied warranty of sea-worthiness, as stated in the preceding case, and in the summary at the beginning of this chapter, have lately been fully recognized

Munro v. Vandam, Sittings bef. Ld. Kenyon at G. Hall, after Mich. 1794.

of this kind, it is true, must depend upon its own circumstances; but when they are once ascertained, the rule of law is clear and decisive. The most material case upon this subject in the law of *England* is that of the *Mills* frigate, which underwent a variety of discussion in several courts, and in which all the principles on which this doctrine is founded were fully discussed. I have used my utmost endeavours to procure a copy of the opinions of the Judges upon that case: but they have been ineffectual: therefore the reader must be satisfied with a full statement of the circumstances, as they appeared upon the demurrer to the evidence.

Before the proceedings in this case are stated, it will be necessary to mention, that an action had been brought in the Court of Common Pleas on the same policy against one of the underwriters; and Lord *Camden*, who tried that cause, directed the jury to find a verdict for the plaintiff: but upon a motion for a new trial, His Lordship declared, that he had changed his opinion: and the whole Court of Common Pleas laid down the principles above stated, and directed a

recognized and adopted in several cases upon appeals from Scotland in the House of Lords. The facts of those cases are not at all material to be mentioned: but in one case, it was stated to be a clear and established principle, that if a ship be sea-worthy at the commencement of the risk, though she becomes otherwise in an hour from that time, the warranty is complied with, and the underwriter liable. This is exactly conformable to Lord *Mansfield*'s doctrine in the case of *Eden* v. *Parkinson*, quoted above in the text. But in the same case it was also said by two noble Lords, "That when the inability of the ship to perform the voyage becomes evident, "immediately after leaving the port, or in a short time after the risk commences, without any apparent cause of injury, the presumption is, that "this inability has arisen from causes existing before her setting sail on "her intended voyage, and that the ship was not then sea-worthy, and "the *onus probandi* in such a case is thrown upon the assured to shew that "the inability arose from causes subsequent to the commencement of the "voyage." This latter doctrine is in conformity with Lord *Kenyon*'s opinion in *Munro* v. *Vandam*.

Watson v. Clark, 1 Dow. 336.

This does not destroy the doctrine that the ship is *primâ facie* to be deemed sea-worthy, but merely that when a ship, soon after sailing, is found unfit to proceed, the question must be decided by some evidence or by rational inference from the circumstances. In the House of Lords also it has been held that a vessel cannot be deemed sea-worthy for a foreign voyage *without knees*.

Parker v. Potts, 2 Dow. 23.

Watt v. Morris, 1 Dow. 32.

new

new trial. Upon the second trial, Lord *Camden* stated to the jury the opinion he had formed upon the subject, and a verdict was accordingly given for the defendant, which, upon a subsequent application, the Court of Common Pleas refused to set aside. The plaintiffs then commenced a new action in the Court of Exchequer against another of the underwriters, and which is now the subject of our attention.

Mills and another v. Roebuck. In the Exchequer.

This was an action on a policy of insurance, lost or not lost, at and from the *Leeward Islands* to *London*, warranted to sail on or before the 26th of *July*, upon any kind of goods, wares, and merchandises; and also upon the body, tackle, *&c.* of and in *the good ship or* vessel called the *Mills Frigate*, beginning the adventure on the goods from the loading thereof *on board* the said ship at *St. Kitt's*, and upon the ship *from her* arrival at the *Leeward Islands*. The defendant undertakes to indemnify against the usual risks, for a premium of 2*l.* 10*s.* *per cent.* The loss was described in the first count of the declaration in these words: — "That the said ship, after "her departure from *Nevis* on her voyage, and during her "said voyage, sailing and proceeding on the high seas by and "through the force of winds and tempestuous weather, and "by and through the mere perils and dangers of the seas, "sprang divers leaks, and became very leaky, crippled, "bulged, disjointed, split, and wholly lost." In the second count the loss is alleged thus: — "By and through the mere "perils and dangers of the seas, and by the starting and "loosening of one or more plank or planks of the said ship, "and by accidentally springing one or more leak or leaks, the "said ship became very leaky, crippled, *&c.* and totally un- "able to proceed on, or perform the said voyage." There were two other counts in the declaration upon a policy on freight to recover from the underwriter the amount of his insurance upon that also; and a fifth count for money had and received to the plaintiff's use. The defendant pleaded the general issue; and paid the premiums into court.

This cause came on to be tried before Lord Chief Baron *Parker*; and the defendant demurred to the evidence produced on the part of the plaintiff. The demurrer follows in these words:—Thereupon the said *John* and *Thomas Mills* (the plaintiffs)

plaintiffs) shew in evidence to the jury to prove and maintain the issue within-mentioned on their part, to wit, that the defendant underwrote the policy of insurance, and that the plaintiffs were interested to the amount as in the declaration is mentioned: that the ship in question was a *French*-built ship, and known to be so to the defendant at the time he underwrote the said policy: that the timbers of *French* ships are usually fastened with iron bolts or spikes, which are liable to grow rusty: and when the same are grown rusty, the timbers of such ships frequently become loose at once, and the ships are rendered incapable of bearing the sea, without any perceptible symptoms of decay: that the ship in question was purchased by the plaintiffs in the year 1757: that since that time she has been generally employed by the plaintiffs, who are *West-India* merchants, in that trade; and large sums have constantly been insured on her and her cargoes; that in *February* 1764, being bound to the *Leeward Islands*, and back again to *London*, she sailed on her voyage; that before she sailed from *London* on that voyage, the plaintiffs ordered the captain to have every thing done to the ship, which he should think proper to repair her: that in pursuance of such orders, the ship was put into dock and repaired, where the ship-carpenter did all such repairs to her as he was ordered, the expenses of which amounted to about 100*l.* of which about 30*l.* was for the sheathing and other repairs of her hull, and the residue in her upper works: that nothing more appeared to the ship-carpenter, or the captain, to be wanting to make her fit and complete for the said voyage; but her iron bolts and spikes were not then examined, which could not be done without taking off her sheathing; an act never done where (as the case is here) the ship had been sheathed a little time before: that *George Hayley*, Esq. the first underwriter on this policy, and many other persons by whom policies of insurance are generally underwritten, keep a register, in which all ships usually insured by them, are entered, with an account of the age, construction, and visible goodness of the vessels, and to whom they belong, and also employ a surveyor, whose business it is to survey such ships: that the ship in question, at the time of underwriting the policy, and long before, had been entered in such register; and previous to her last outward-bound voyage, had been surveyed by one *Thomas Whitewood*, who

who was then employed by the said *George Hayley*, and other underwriters, as such surveyor; and as far as appeared to the said *Thomas Whitewood*, was in good condition, and perfectly fit to undertake a voyage to and from the *Leeward Islands*; but the surveyor did not, neither could he, examine the bolts and spikes for the reasons aforesaid; but did survey, as far as is ever practised, in such cases: that the said *George Hayley* had often before underwrote policies on the said ship and her cargoes; and the witness, who was the insurance broker, said he believed Mr. *Hayley* knew as much of the condition of the said ship as the plaintiffs did, and particularly on the outward-bound voyage to the *Leeward Islands*, he underwrote 400*l.* on this ship: that in such last outward-bound voyage, the ship met with a great deal of bad weather; was very leaky, and could not get into *Madeira*, where she was ordered to touch; but was obliged to bear away for the island of *Nevis*: that she arrived at the island of *Nevis* on the first of *April* 1764, and from thence went to the island of *Saint Christopher*, where she delivered her outward bound cargo, and had such repairs done to her, as were then thought necessary, and to all appearance put into a proper condition for her voyage home; but her bolts and spikes were not, nor could be examined there: that about the end of the said month of *April*, the ship sailed from *St. Kitt's* to *Nevis*, where the captain had been promised a loading for her home: that on her arrival at *Nevis*, the planters, knowing she had been leaky in her outward-bound voyage, were not willing to put sugars on board her; and that in order to satisfy the planters there, that she was in a proper condition to carry a cargo of sugars to *London*, they proposed to the captain, as a measure which would be fully satisfactory to them, that he should submit the ship to be surveyed by all the captains then in the harbour, being six in number; and told him, that if they should report her to be fit for a voyage to *London*, they would then load her with sugars: that the captain did submit to such survey, though it would have been for the interest of the said captains to report the ship unfit for the voyage; as by that means they would have had an opportunity of gaining more freight and sooner: that on the 8th day of *May* 1764, the said captains after having surveyed her carefully, but without examining her bolts and spikes, which could not be done there, signed the following

 report:

report: "*Nevis*, *May* 8th, 1764. At the request of captain "*George Finch*, of the ship *Mills Frigate*, we the subscribers "did repair on board the said ship, and after due examination, "it did appear to us, that the occasion of the ship's making "more water than usual on her voyage from *London* to this "place, was occasioned by some neglect in caulking the said "ship, which may very easily be made tight, the said ship "otherwise appearing to us to be strong and sound; and when "caulked, we are of opinion, will be fully sufficient to carry "a cargo of sugars to *London*. *John Shepherd*, *&c.*" That afterwards the ship was caulked according to the said report, and that thereupon the planters sent their sugars on board, and the ship was soon loaded with about three hundred and seventy hogsheads of sugar: that during the time of her loading, and until and at the time of her sailing, which was about two months, the ship continued tight, appeared to be in good condition, and made no more water than the best ships usually do, and are expected to do: that the ship sailed from *Nevis* on the 26th day of *July* 1764, about eight o'clock in the evening, and the next day, about four o'clock in the afternoon, without any bad weather or extraordinary swell of the sea, she sprang a leak, and the captain was obliged to bear away for *St. Christopher's*, where he arrived on the 28th of *July*: that on his arrival there, he got the ship unloaded to see what was the matter with her, when it appeared that she had started a plank; that he thereupon applied to the judge of the Court of Vice-admiralty for a warrant to survey the ship; and a warrant was granted to four captains, and two ship-carpenters, or any three of them; four of whom did, according to such warrant, survey the said ship, and did report, that she was unfit to proceed on her voyage without being thoroughly repaired: and that the expence of so repairing her there, would amount to more than the value of the ship and freight; and she was therefore condemned by the said court as unfit for the said voyage: that some of the iron bolts and spikes with which the timbers of the ship in question, like other *French*-built ships, were fastened, were broken in the plank that was so started, which the captain and the said surveyors felt, by passing up their hands between the plank and the ship; and which appeared upon farther opening the ends of the plank; and that the said plank was started from one end

5 to

to the other: that it was owing to the said bolts and spikes being grown rusty and decayed, as then appeared to the captain and surveyors, that such plank started: that he believed the surveyors, who condemned her, thought the same; wherefore, and supposing the other bolts and spikes in the ship were also grown rusty and decayed, though that could not be known for certain, without ripping off her planks, and making a more strict examination, the surveyors made their said report of condemnation: that the said plank was not taken off, nor could it be, without sinking the ship, which has not yet been broken up, but continues at *St. Christopher's* as a hulk: that on the aforesaid account, it was then concluded, and is now believed by the captain, *that the said ship was not fit for the insured voyage* home, at the time she so sailed from *Nevis* for *London, though, to all outward appearance, she was a very good ship, and* as he then believed, *proper for the voyage;* and such a ship as he, *from her outward appearance, should have had no objection to sail in again;* but had he known the decayed condition of her said bolts and spikes before he set sail on his homeward-bound voyage, he would not have ventured his life in her: that there is no dock, nor scarce any materials for repairing ships at *St. Christopher's*, nor could she sail to any other place to be repaired: and that if this misfortune had happened in *North America*, or *England*, where there are proper docks and materials, she might have been repaired for three or four hundred pounds: that while the said ship was first at *St. Christopher's*, before she had taken in her cargo, namely, on the 23d of *April* 1764, the captain wrote the following letter to the plaintiffs:

"Gentlemen, *St. Christopher's, April* 23. 1764.
"I take the first opportunity of acquainting you, that I "arrived at *Nevis*, after a most dismal passage, on the first "instant. On the sixth of *March*, at day-break, I made the "islands *Deserts*, distant about four leagues, ran down for "*Madeira*, with a fresh gale at E.S.E. till four in the after-"noon, when being within a mile off the shore, and judging "about five or six miles off *Fenchall Road, a very hard and "dark squall took us suddenly with such violence, that I was "obliged to clear off the land under the courses.* It was ex-

 "cessively

" cessively hazy the whole evening after, that one could
" hardly see the ship's length; so that it would have been the
" greatest imprudence to have run the risk of overshooting
" our port, or running ashore. The gale increased, and, in
" the night, came round to the N. E. and *the ship strained so*
" *much by the pressure of sail we were obliged to carry on her in*
" *that great sea, that it was with the utmost difficulty we could*
" *keep her free.* On the eighth, at nine in the morning,
" reckoning myself nineteen leagues to leeward of *Madeira*,
" *our ship so loosened*, that we could not carry sail upon a
" wind; and seeing no probability of the wind shifting or
" abating enough to give us a chance of beating up, bore
" away for *Nevis*, judging it better for the preservation of the
" whole than to run any hazard in endeavouring for the
" *Canaries* in our weak, leaky, and distressed condition. I
" have consulted with Mr. *Cottle*, the counsellor here, who
" advises me to sell the flour and lime at public vendue, and
" to carry the iron hoops, &c. back to *England*. *As the ship's*
" *complaint has been chiefly in her upper works, I am obliged*
" *to have her new nailed from the wail upwards*; and hope
" you will find that what repairs are necessary to be made
" here, are conducted with all the frugality circumstances
" will admit of."

That the plaintiffs received this letter in *London* on the 13th day of *June* 1764, and, a day or two afterwards, gave it to *Matthew Towgood*, an insurance broker, to get 1000*l.* insured on the freight home for the use of the owners, and 250*l.* on their fourth part of the said ship: that the said *Towgood* first shewed the policy in question and the letter to the said *George Hayley*, on the 19th of *June* 1764, who, after reading over the letter, asked him what interest he had to insure: to which the broker answered, ship, freight, and cargo; and that he might write which he pleased: that thereupon the said *George Hayley* said he would underwrite the ship, saying she would come home safe enough, notwithstanding the damage which the said letter imported she had received, as it was a summer-voyage: but that she would very likely damage her cargo: that the said *George Hayley* was going to underwrite the said policy for 300*l.* on the said ship, and had wrote the figure

figure 3: but on the said *Matthew Towgood*'s telling him, he was a bold man to write three hundred pounds after reading the said letter, the said *George Hayley* struck out the figure 3, and converted it into a 2, and accordingly underwrote the said policy for the sum of two hundred pounds on the said ship: that the said *Matthew Towgood* shewed the said letter to the said defendant *Roebuck*, and all the other underwriters on the said policy, before they underwrote the same; and the said defendant says, that the evidence aforesaid, in manner and form aforesaid, shewn by the plaintiffs to the jury, is not sufficient in law to maintain the issue within joined on the part of the said plaintiffs; and that he, the defendant, to the evidence aforesaid, hath no necessity, nor by the law of the land is obliged to answer. Wherefore he prays judgment, and that the jury may be discharged from giving any verdict upon the issue.

The plaintiffs join in demurrer.

This demurrer was argued in the Court of Exchequer, and judgment was there given in favour of the assured: and of what fell from the Judges on that occasion, I have been only able to procure this account, "that judgment was given for "the plaintiffs, not upon the points argued (namely, that it was "essential that the ship should be sea-worthy), the Court being "as to those of opinion with the underwriters; but because "the evidence did not, as the Court thought, precisely prove "that the ship was not sea-worthy, at the time of the insu-"rance taking place on the 1st of *April* 1764, on her arrival "at *Nevis*, but only that she was so at the time of her sail-"ing on the 26th of *July*." But the Court unequivocally declared, that a ship, that is not *at the commencement of the insurance* in fit condition to perform her voyage, is not a fit subject of insurance. Upon this judgment a writ of error was brought in the Exchequer-chamber, which was argued before Lord *Mansfield* and Lord Chief Justice *Wilmot*, who were to report their opinions thereon to the Lord Chancellor; and the judgment of the Court below was ultimately affirmed. Whether the judgment was so affirmed upon the specific ground taken in the Court of Exchequer, or upon some difficulty arising out of the form of proceeding (being upon a

 demurrer

demurrer to evidence (*a*),) does not now appear: but whether upon the one ground, or the other, there is no doubt, though judgment was given for the plaintiffs, that the principles of insurance law upon the subject of sea-worthiness, and the doctrine of implied warranties or conditions, have always been considered as unalterably fixed and ascertained since that period, although that doctrine was not then for the first time stated in our *English* courts, and was certainly long before known in the law of insurance in other parts of *Europe*. It is unfortunate that from the circumstance of there being no printed report of this case, and from the practice of the two Chief Justices reporting their opinion in private, the grounds of that opinion cannot now be obtained: but it cannot be disputed from the opinions of Lord *Mansfield* and other judges both before that time and since, that the principles laid down in the beginning of this chapter are clearly established as the law of *England*.—That these principles were so established is manifest from the following decisions:

Lee v. Beach, Sittings at Guildhall after Mich. Term. 1762.

The plaintiff had purchased a ship, and after having her surveyed by proper judges, he sent her into the dock, and there had her fully repaired, and the ship-builder was ready to swear, that he effectually repaired her, as he thought, having done all that was required to make her a good ship; she

(*a*) See the case of *Cocksedge* v. *Fanshaw*, *Dougl.* 119. and the case of *Gibson* and *Johnson* v. *Hunter*, in error, in the House of Lords, 2. *H. Black.* 187. where it appears to be decided by all the Judges, that in a case of circumstantial evidence (as in the case of the *Mills Frigate*) it *is not* competent to the defendant to insist upon a jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, without distinctly admitting upon the record, every fact and *every conclusion*, which the evidence given for the plaintiff tended to prove. And in the former case it is expressly said, that the demurrer to evidence *admits* the truth of all facts, which the jury *might* or *could* infer in favour of the party offering the evidence. Upon the form of proceeding therefore in the case of the *Mills Frigate*, and consistently with the notion entertained at the time when *Cocksedge* v. *Fanshaw* was decided of the effect of a demurrer to evidence, as it was a case of circumstantial evidence, on which the jury *might* have drawn a conclusion in favour of the plaintiffs, it is possible that judgment might have been given for the plaintiffs independently of the ground taken in the Court of Exchequer, and whatever opinion the Judges might entertain on the main point in the cause.

then

then was taken into the government-service, on which occasion she was as usual surveyed by the persons employed for the purpose. She sailed out of the *Thames*, and arrived at *Portsmouth*, but being very leaky with bad weather, the Admiral ordered her to go in and undergo a survey there. This was done, and it was found on opening her, that some timbers near her keel were very bad, insomuch that she was condemned as insufficient to proceed.

The plaintiffs having insured her, applied to the underwriters for the loss; the defendant was one; and the plaintiff insisted he had and could prove that he had done every thing in his power to send her out sufficient and good, and that this defect was a latent cause not known to him or discovered when she was surveyed or in the dock repairing.

Lord *Mansfield* said, that it appeared that the ship had died a natural death, and received her death-blow before the insurance commenced; and however innocent the plaintiff was, and however cautiously he had acted, the underwriter was equally innocent; and the implied warranty must and ought to have its effect, and the plaintiff must make the best of a bad bargain: he had the ship (defective as she was) not injured from any sea loss after the insurance was made. The plaintiff was nonsuited.

So also in another case where an action was brought by an innocent shipper of goods (no part-owner of the ship) against the underwriter, and the policy was effected on goods in the *Amy and Letitia at and from Montserat to London*. It appeared that the ship sailed the 26th of *July*, and the next day without any bad weather she was very leaky and obliged to run for *St. Thomas's* one of the *Virgin* islands, where she was unloaded, and the goods, being much damaged, were sold. It could not but be allowed on all sides, that the ship was not sea-worthy to undertake the insured voyage; and it was agreed and admitted by defendant that the shipper of the goods was a stranger to it when the goods were shipped. The plaintiff was nonsuited, Lord *Mansfield* saying, that the implied warranty could not be dispensed with in any case; that it was a point of law, and if the plaintiff's counsel thought

Oliver v. Cowley, Sittings at Guildhall after Trin. 1765.

there was any ground to go upon he would save the point: but the plaintiff's counsel declined this, being satisfied the question was clear against them. The plaintiff was nonsuited.

That these principles, subsequent to the case of the *Mills Frigate*, were deemed to be unshaken, is manifest from this, that within two years after the case of the *Mills Frigate* was decided (judgment having been given in that cause in *January* 1769) Lord *Mansfield*, in the case of the *Earl of March* v. *Pigot*, which came before the Court of King's Bench in the year 1771, the case of the *Mills Frigate* having been mentioned at the bar, said, — "The insured ought to know "whether his ship was sea-worthy or not when she set out "upon the voyage insured; but how should he know the "condition she might be in, after she had been out a twelve-"month?" (*a*)

5 Burr. 2802.

And

Forbes and another v. Wilson, Sittings after East. Term, 1800.

(*a*) In a late case, where an assurance was on the ship *Henry*, "*at and* "*from Liverpool* to the coast of *Africa*," &c. it appeared that at the time the policy was made, the ship was not in a condition to go to sea, but was in fact at the time undergoing very material repairs; and it was contended by the underwriters that as the risk described was *at* as well as *from*, if the ship was not sea-worthy, from whatever cause, when the policy was subscribed, it was void; and that any repairs done afterwards, so as to make her completely sea-worthy at the time of sailing, would not cure that defect.

Lord *Kenyon* was of opinion that, under the words *at and from*, it is sufficient if the ship be sea-worthy at the time of sailing, for from the nature of the thing, the ship, while *at* the place, probably must be undergoing some repair. The plaintiffs had a verdict; and no motion was made to set it aside. And, in a subsequent case *, Lord *Kenyon* held the same opinion. And in a still later case †, when the case of *Forbes* v. *Wilson* was quoted, Lord *Ellenborough* said, "I agree with the doctrine of that case: it is quite sufficient if the state of the ship be commensurate to her then risk. There may be a state of sea-worthiness sufficient while in harbour; and there is a state of sea-worthiness for the voyage."

* Smith v. Surridge, 4 Esp. 25. See post Ch. on Deviation.

† Hibbert and others v. Martin, Sittings at Guildhall after Mich. Term, 1808.

It has again also ‡ been said in the Common Pleas, that a ship much out of repair may be sufficiently sea-worthy for a harbour and is protected under the word *at*: and as a full complement of men is not necessary in harbour, she does not cease to be sea-worthy for want of a crew, till she sail on the voyage without a crew. If a ship, sufficiently sea worthy for lying in port, sails without being rendered sea-worthy for the voyage, the risk *at* had attached, and there can be no return of premium.

‡ Annan v. Woodman, 3 Taunt. 299.

And where a vessel, engaged in the southern whale and seal fishery, with liberty to chase and capture prizes, is insured in *August* 1807, from the

Hucks v. Thornton,

And again His Lordship, in the case of *Eden* v. *Parkinson*, decided in the year 1781, confirmed the doctrine, by observing that "by an implied warranty, every ship insured must be "tight, staunch, and strong: but it is sufficient if she be so "at the time of her sailing. She may cease to be so in twenty-"fourhours after her departure, and yet the underwriter will "continue liable." Dougl. 732.

So also in a very modern case, the law respecting the implied warranty of sea-worthiness was accurately stated, and the reason of it clearly illustrated by Mr. Justice *Lawrence*. The learned Judge said, "I also doubt whether there is any "analogy between a case like the present and cases where "there is an implied warranty of sea-worthiness. The latter "is implied from the nature of a contract of insurance. The "consideration of an insurance is paid in order that the "owner of a ship, *which is capable* of performing her voyage, "may be indemnified against certain contingencies; and it "supposes the possibility of the underwriter's gaining the "premium: *but if the ship be incapable* of performing her "voyage, there is no possibility of the underwriter's gaining "the premium; and if the consideration fail, the obligation "fails. In the case of the *Mills Frigate* it was said that the "ship's being capable of performing the voyage was the "*substratum* of the contract of insurance. So if a ship sail "without a sufficient crew, she is incapable of performing the "voyage.' Christie v. Secretan, 8 T. Rep. 192.

The doctrine thus established is by no means novel in itself, but is entirely consonant to the laws of all the maritime and commercial nations in *Europe*, as will presently be demonstrated.

the 1st *August* in the preceding year, although at the time of her insurance she was not competent to pursue all the purposes of her voyage, her crew being reduced by death and casualties, if she had a competent force to pursue any part of her adventure and could be safely navigated home, Lord Ch. Just. *Gibbs* held her to be sea-worthy. 1 Holt. 5?

But if the insurance be on goods, ought not the ship to be sea-worthy, when the goods are beginning to be loaded, at which time the risk *on goods* commences?

The

The sea-worthiness of the ship being thus shewn to be an implied condition in this species of contract, it follows of course, that, in entering into the engagement, it is not necessary that there should be any previous representation of the condition of the ship; because, unless it be fit for the performance of the voyage insured, there is no binding contract; but any insufficiency of the vessel in a former voyage will not vacate the policy.

Shoolbred v. Nutt, Sittings at Guildhall after Hil. 1782.

Thus in an action upon a valued policy of insurance upon the ship *Two Sisters*, and a cargo of wheat and wines, *from Madeira to Charlestown*; the ship had sailed *from London to Madeira*. The plaintiff, who was owner of the cargo, ordered his broker to procure an insurance *from Madeira* for the voyage to *Charlestown*, which was accordingly done; but he did not communicate to his broker or the underwriters two letters which he had received from his captain the day before he effected the insurance, stating, that the ship had arrived at *Madeira*, but was very leaky, and that the pipes of wine had been half covered with water. But it was proved at the trial, that the leak had been completely stopped before she sailed from *Madeira*, and of course before the commencement of the risk insured. In her voyage to *Charlestown* she was taken, and the plaintiff abandoned.

Lord *Mansfield* told the jury, "that there should be a representation of every thing relating to the risk, which the underwriter has to run, except it be covered by a warranty. *It is a condition, or implied warranty, in every policy, that the ship is sea-worthy*; and therefore there need be no representation of that. *If she sailed without being so, there is no valid policy.* Here the leak was stopped before she sailed from *Madeira*, and she sailed in good condition from thence; and there is no occasion to state the condition of a ship or cargo at the end of her former voyage." There was a verdict for the plaintiff.

Haywood v. Rogers, 4 East, 590.

And upon the authority of this case, and the reason of the thing, the Court of King's Bench declared, after time taken to deliberate upon a motion for a new trial, by Lord *Ellenborough* Chief Justice, that an assured having impliedly warranted his ship to be sea-worthy, and having concealed no circum-

stance

stance relative to the sea-worthiness, which he was required to disclose, and not having, at the time of effecting the policy, known of any fact which rendered her, with reference to the risk insured, otherwise than sea-worthy, is entitled to recover.

Upon this principle also depends the decision of some modern cases; for if it be necessary that the ship itself should be sufficient for the voyage, it has been held to be an implied condition, that she should be furnished with every thing necessary for the purposes of safe and careful navigation (*a*). In an action upon a policy on ship and goods from *Stettin to London*, it appeared that the captain had taken *a pilot* on board at *Orfordness* on entering the river *Thames*, who again quitted her at *Halfway Reach*; after which, and before she had come to her moorings higher up the river, the accident happened which occasioned the loss, and in consequence of which the vessel filled with water before she had been moored twenty-four hours. But the precise time, at which the damage was sustained within those limits, or by what particular default, was not ascertained. The captain had also left the ship before the time of the actual loss. It further appeared that the pilot taken in at *Orfordness* was not properly qualified at the time according to the provisions of the 5 *Geo.* 2. c. 20. for the regulation of pilots on the river *Thames*, but it did not appear that this fact was known to the captain, and the pilot had since received his regular qualifications. The plaintiff having obtained a verdict, a motion was made to set it aside; and after argument,

Law v. Hollingworth, 7 Term Rep. 100.

Lord *Kenyon* said, — " The principle on which this case must be determined seems to be admitted on all hands, namely, *that the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage: the ship herself must be sea-worthy, she*

(*a*) And, therefore, in a late case in the House of Lords, Lord *Eldon* stated, that under this implied warranty, it is not only necessary that the hull of the vessel be tight, &c.; but that the ship be furnished with ground tackling, sufficient to encounter the ordinary perils of the sea; and therefore where the best bower-anchor, and the cable of the small bower-anchor were found defective, ship was not sea-worthy.

Wilkie v. Geddes, 3 Dow. 57.

must

must have a sufficient crew, and a captain and pilot of competent skill. I do not feel that I am bound in this case to decide whether or not it be necessary that there should be on board the vessel a pilot qualified according to the act of parliament referred to. This case may be disposed of without deciding that question. It might be contended, though with what effect I will not say, that if the captain had taken a pilot, who represented himself duly qualified, and whom the captain believed to be so, but who in fact had not a qualification, the captain would have discharged his duty, and the underwriters would have been answerable for any loss that had happened. But in this case, the captain did not perform his duty: for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind that there shall be some person on board the ship apparently qualified to navigate her. If the underwriters had been previously informed that there would be no pilot on board during the ship's sailing up the river *Thames*, probably they would not have undertaken the risk. On the ground, therefore, that there was *no pilot* on board when the accident happened, I am of opinion that there must be judgment of nonsuit."

Mr. Justice *Grose*. — "The question is not, whether the assured can recover in a case where there was a pilot on board, though not properly qualified; but, whether or not the defendant be liable for a loss, which happened to the vessel when there was no pilot of any kind on board? I think he is not, because *it is understood in all contracts of insurance that there should be such a person on board the ship.*"

Mr. Justice *Lawrence* concurring, the rule for entering a nonsuit was made absolute.

Tait v. Levy 14 East, 481. Upon the same principle the Court of King's Bench lately held that there was a failure of the implied warranty on the part of the assured, that a captain and crew of competent skill and knowledge for the declared purpose of the voyage, should be provided: the captain was so grossly ignorant as not to know *Tarragona* from *Barcelona*, the express warranty

ranty in the policy being that the vessel should not go higher up the *Mediterranean* than *Tarragona*.

The same principle of an implied warranty that every ship insured shall be duly navigated was the rule of decision in another case, and was taken to be so well established both at the bar and on the bench, that that point was never mooted; and the only question made upon the occasion was, Whether the condition had not been performed? It was an action on a policy of insurance on the *Cadiz Dispatch*, on a voyage from *London* to the coast of *Africa*; and the principal question was, Whether the ship had been navigated in the manner prescribed by the statute of 31 *Geo.* 3. c. 54. s. 7. (*a*)? for if not, it was agreed that the insurance was void. The statute requires that no person shall take the command of an *African* ship until he shall have made oath, and produced to the officer of the customs *a certificate attested by the respective owner or owners* that he has already served in that capacity during one voyage, or as chief mate and surgeon during two voyages, *&c.* under certain penalties. The Court were of opinion, that the certificate produced in the particular case, being signed by the then owner, did not comply with the requisitions of the statute, that therefore the ship was not duly navigated, and confirmed the judgment of nonsuit, which had passed against the plaintiff at *Guildhall*, by Lord *Kenyon*'s directions.

Farmer v. Legg, 7 Term Rep. 186.

I have alluded to the above decision, as strongly confirming the principles of law, which are the subject of the present chapter. I think it proper to mention that the difficulty which occurred in the last case from the manner in which the acts of parliament were penned, has been removed by the statute 39 *Geo.* 3. c. 80. s. 23. requiring expressly that the certificate shall be signed by the owner or owners of the ships or vessels in which the captain has *formerly served*. But as it

(*a*) This was one of the statutes passed on the subject for regulating the *African* slave-trade; it has since been continued down by several acts from time to time; and the reference is made to this particular act, as being set out in Mr. Serjeant *Runnington*'s edition of the Statutes: but the act quoted in court was 32 *Geo.* 3. c. 52. But the slave-trade is now entirely abolished by stat. 47 *Geo.* 3. c. 36. See ante, p. 34. note (*a*).

had

had been as much the custom in the outports to receive certificates of one form as of the other, on account of the doubtful penning of the former acts, the legislature in the last mentioned statute (s. 38.) has provided that no policies of insurance made before the statute now in recital shall be held to be void, on account of the irregular certificates given under the former statutes.

The present Lord Chief Justice also, Lord *Ellenborough*, has had occasion to declare the law upon this very important subject, and to shew that the principle of sea-worthiness extended to the goodness of the sails and rigging, as well as to the sufficiency of the hull; and for its importance I give His Lordship's opinion at length.

Wedderburn and others v. Bell, 1 Campbell, N. P. 1.

It was an insurance on goods on board the *Minorca*, "at and from *Jamaica* to *London*," at a premium of ten guineas, to return five pounds *per cent.* if the ship sailed from the place of rendezvous with convoy for the voyage and arrived. The first count of the declaration stated the loss to be, by the barratry of the master; the second, by the perils of the sea. The ship sailed for *England* with convoy in the end of *July*, and parted from the fleet on the 12th of *August*, and was never more heard of, whence she was supposed to have foundered. The defence rested on two grounds: first, that she was not properly equipped with sails; and secondly, that she had not a sufficient crew. It appeared in evidence, that the sails, which were used in stormy weather, were in good condition; but that her maintop gallant sails and studding sails, which are useful in light breezes, were extremely rotten, and almost quite unserviceable. The evidence about the state of the crew was contradictory.

Lord *Ellenborough*.—"In an action of this kind, the plaintiffs are bound to prove, not only that the ship was tight, staunch, and strong, but that she was properly *equipped with sails*, and other stores: and that she was *manned* with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching, and if they were not complied with, so that the peril was enhanced, from whatever cause this might arise, and though no fraud

was

was intended by the assured, the underwriters have a right to say, they are not liable. The hull of the ship in this case was sufficient and sea-worthy: but it appears, that when she left *Jamaica*, her sails were highly defective. It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea, and which might enable her, if not intercepted from, at some period or other, completing her voyage. A person who underwrites a policy upon her has a right to expect that she will be so equipped with sails, that she may be able to keep up with the convoy, and get to her port of destination with reasonable expedition. She must be rendered as secure as possible from capture by the enemy, as well as from the danger of winds and waves. But here the *Minorca* appears to have been deficient in sails, on which her speed might materially depend: and if so, the risk being thereby greatly increased, the policy never attached, and this action cannot be supported. His Lordship also thought, that upon the balance of evidence, the crew was insufficient. The defendant obtained a verdict.

In the ordinances of *Lewis* the Fourteenth it is declared, that decay, waste, or loss, which happens from the internal defect of the thing insured, shall not fall upon the underwriter. A commentator upon these ordinances has gone into the reason and principle of such a regulation, and has shewn the propriety of it. He sets out by observing, that this doctrine is of a date as ancient as the period when the *French* treatise called *Le Guidon* was published, which was about the year 1661, at which time, as appears by a reference to the book itself, it was considered as a settled principle, that losses, happening from causes of this nature, were not to be a charge upon the underwriter. The same author has also shewn, that such a provision is adopted in favour of the insurers by the ordinances of *Rotterdam* and *Amsterdam*. After stating these circumstances he proceeds to say, that when a ship is deemed incapable of finishing her voyage, the question whether this event is a charge upon the underwriters or not, depends upon another; namely, whether it happened by the violence of the sea, or other fortuitous circumstance, or whether the disability proceeds from age and rottenness. This will be determined by the enquiry which was made before the departure

Ord. of Lew. 14th, tit. Insurance, art. 12. 2 Val. 80.

C. 5. art. 3.

2 Mag. 90. 140. 2 Val. 81.

parture of the ship in order to judge,. whether it was in a condition to perform the voyage or not: if the latter was the case, the insurers ought not to answer. In another part of
1 Val. 654. this work, after laying down the same doctrine, he declares, that the indemnity will be void, even though the ship has been examined before her departure, and declared capable of performing the voyage; since the event has shewn clearly, that on account of latent defects it was no longer navigable; that is, if it were proved that parts of the ship were so rotten, weakened, and destroyed, that she was not in a proper state to resist the ordinary attacks of wind and sea, inevitable in every voyage, then the underwriters are discharged. The reason is, that the examination of the ship before her departure extends only to the external parts, because she is not unripped; at least not so as to discover the interior and latent defects, for which the owner or master of the ship continues always responsible, and that with the greater justice, because they cannot be wholly ignorant of the bad state of the ship: but supposing them to be so, it is the same thing, being indispensably bound to provide a good ship, able to perform the voyage. (*a*)

Pothier Tr. d'Assurance n. 66. 1 Emerigon, p. 580. The opinion of this learned foreigner is supported by two of his countrymen, *Pothier* and *Emerigon*.

Having thus shewn that the doctrine of sea-worthinesss, as established by the decisions of our courts of justice, is confirmed by the declarations of foreign laws, and by the opinions of foreign writers; it is sufficient now to say, that where the ship is not sea-worthy, the policy of insurance is void, as well where the insurance is upon the goods to be conveyed in the
2 Val. 164. ship, as when it is upon the ship itself. For whenever a cause arises with respect to damage done to goods through the insufficiency of the ship, the question, whether the master or owner is liable to make good the loss, depends upon ascertaining, whether the ship was in a condition to perform the voyage at the time of the commencement of the risk, or became defective from bad weather, and the perils of the wind and sea.

(*a*) Upon the doctrine of implied conditions, see *Roccus*, note 98.

CHAPTER XII.

Of Illegal Voyages.

WE proceed now to the consideration of another circumstance by which the contract of insurance is vacated and annulled *ab initio*: and it is this; that whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of the country, the policy is of no effect. The principle, upon which such a regulation is founded, is not peculiar to this kind of contract; for it is nothing more than that which destroys all contracts whatsoever: that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt such a thing, it is invalid, and will not receive the assistance of a court of justice to carry it into execution.

The most material case upon this point is that of *Johnson* and *Sutton*, which came on to be argued in the year 1779, and received the solemn opinion of the Court of King's Bench.

It was an action on a policy of insurance on goods, on board the ship *Venus*, "lost or not lost, at and from *London* to *New York*, warranted to depart with convoy from the Channel for the voyage." The cause was tried before Lord *Mansfield* at *Guildhall*, and a verdict was found for the plaintiff. The defendant obtained a rule to shew cause why there should not be a new trial. The facts, upon His Lordship's report, appeared to be these:—The ship was cleared for *Halifax* and *New York*. She had provisions on board, which she had a licence to carry to *New York*, under a proviso in the prohibitory act of 16 *G*. 3. c. 5. But *one half of the cargo, including the goods, which were the subject of this insurance, was not licensed*, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe* to allow the entry of unlicensed goods at *New York*; and though there were bonds usually given at the Custom House here, by which the captain engaged to carry the

Johnson v. Sutton, Dougl. 254.

the goods to *Halifax*, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at *New York*, declaring, that they were landed there. *The commander-in-chief had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods.* The *Venus* was taken in her passage to
16 G. 3. c. 5. *New York* by an *American* privateer. The first section of the statute prohibits all commerce with the province of *New York*, (amongst others,) and confiscates all ships and their cargoes, which shall be found trading, or going to, or coming from trading with them. In section the second, there is a proviso, excepting ships laden with provisions for the use of His Majesty's garrisons or fleets, or for the inhabitants of any town possessed by His Majesty's troops, provided the master shall produce a licence specifying the voyage, *&c.* and the quantity and species of provisions; but by the same *proviso*, it is declared, that goods not licensed, found on board such ship, shall be forfeited. After argument, upon the motion for a new trial,

Lord *Mansfield* said — "The whole of the plaintiff's case goes on an established practice, directly against an act of parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send the goods to *New York*, and, *in pari delicto, potior est conditio defendentis.* It is impossible to bring this within the cases cited (*a*), because here there was a direct contravention of the law of the land." The rule for a new trial was made absolute.

See post. p. 365.

Camden v. Anderson, 6 Term Rep. 723. 1 Bos. & Pull. Rep. 173.

Upon this principle it was that in the cause of *Camden* and others v. *Anderson*, which was long contested in the Court of King's Bench, and afterwards upon a writ of error in the Exchequer-chamber, the underwriters were held not liable, the insurance in that case being made in direct contravention of the exclusive right of trading granted to the *East-India* Company by stat. 9 & 10 *Wil.* 3. c. 44. s. 81. and which exclusive right had never for one moment been suspended, nor had that statute ever ceased to be an existing law. Indeed the

(*a*) These were cases of insurances on ships trading contrary to the revenue laws of foreign countries, of which more will be said hereafter.

principle

principle which destroys all insurances made on ships proceeding on illegal voyages, never was contested at the bar in the argument of the above cause; but only the application of it to the particular case, on account of various statutes which had been passed and repealed, and on account of a clause in a more modern statute, which it was supposed precluded the underwriters from setting up this defence. But no man attempted to argue that that which is unlawful, and a public wrong, could be the ground of an action.

33 Geo. 3. c. 52. s. 150.

Soon after the above decision, a case arose, in which the rights of the *East-India* Company, as far as they were affected by the treaty between this country and *America*, came to be discussed in an action on a policy of insurance. By the 13th article of that treaty, which was confirmed by stat. 37 *Geo.* 3. c. 97. s. 22. the United States of *America* are permitted to trade to and from the *British* territories in *India*. But it was contended, notwithstanding the treaty and statute, that the insurance in question was upon an illegal voyage, being "at and from *Bourdeaux* to *Madeira* and the *East-Indies*, and "back to *America*," whereas the treaty meant to tolerate no other trading than *a direct one* between *America* and the *East-Indies*; and also it was insisted, that *Butler* and *Collet*, the persons for whose benefit this insurance was effected, were not entitled to the benefit of the treaty, they being natural-born subjects of this country, but one of whom, after the ratification of *American* independence, had gone with his wife and family to reside in *America*, has ever since been domiciled there, and received as a citizen of the States of *America*; and the other of whom was resident and domiciled in *America* before the independence of that country, and has continued to be resident and domiciled there; and because their agent, the plaintiff, when he shipped the goods, and when he caused the policies to be effected, was resident in, and a subject of *Great Britain*, and knew that the ship was destined for the *British* territories in *India*. The special verdict in this case, was three times argued in the King's Bench, and once in the Exchequer-chamber; and the learned Judges, composing both those courts, were unanimously of opinion, that a natural-born subject of this country, though he cannot throw off his allegiance to the country, yet he may be a citizen of *America* for the purposes of commerce, and

Wilson v. Marryat, 8 Term Rep. 31. and 1 Bos. & Pull. 430. in which books the judgments in the King's Bench and Exchequer-chamber are fully and accurately given.

entitled in the latter character to all the benefits of the treaty: and that the trade allowed by the treaty between *America* and the *East-Indies* need not be *direct*; it may be carried on circuitously through any country in *Europe*, including *Great Britain*. The plaintiffs had judgment. In the Court of King's Bench, Lord *Kenyon* added, that if in the commencement of one *entire* voyage, there be any thing illegal, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, such illegal commencement would have made the whole illegal, and the assured could not recover upon the policy.

Bell v. Reid, 1 M. & S. 726. And the question again came before the Court, where it was held, that a natural-born subject of this country, domiciled in a *foreign* country in amity with this, may lawfully exercise the privileges of a subject, where he is domiciled, to *trade* with another country, in hostility with this.

Bird v. Appleton, 8 Term Rep. 562. See post. c. 18. So also in pursuance of the principle just adverted to, as falling from Lord *Kenyon*, the Court of King's Bench, in a much-contested case, which must be again hereafter quoted for another point, held, that if a ship was insured AT and from *Canton* to *Hamburgh*, and during her stay at *Canton* was engaged in an illegal traffic, the assured could not recover for a loss of the ship in the course of the voyage *from Canton* to *Hamburgh*.

This point was so held in Sewell v. Royal Exchange Ass. Co. 4 Taunt. 856. But the Court resisted the attempt to carry the principle any farther; for in the same case, it was contended at the bar, that as the ship had been concerned in the *outward-bound* voyage in an illegal traffic, which subjected her to seizure, the insurance made on the *homeward* voyage could not be supported: and also that goods, which had been purchased with the proceeds of a *former illegal cargo*, could not be the subject of insurance. But both these points were overruled by the unanimous judgment of the court, after much argument and great deliberation.

From these cases much information is to be collected; for, 1st, the principle advanced at the beginning of the chapter is established, that is, that an insurance of a voyage, which is prohibited by statute, is void. They also serve to remove a distinction, which occurs in a very respectable writer. The learned *Roccus* observes, that if such an insurance, as that of which we have been speaking, should be made, *ignorante*

Roccus de Assecurat. n. 121.

assecu-

assecuratore, the insurer is discharged: from whence we are to infer, that in his opinion, if the insurer was acquainted with the nature of the voyage, he would continue liable. But the doctrine of the Courts overturns such a distinction, because the very contract is a nullity, and a court of justice can never lend its authority to substantiate a claim, founded upon a contract which is absolutely repugnant to the known and established laws of the land. Of this opinion is *Bynkershoek*, who says, that even if it be told to the underwriter, that the voyage is illicit, he shall not be bound; because the contract is null and void, and where that is the case, the compliance with the terms of it depends upon the will of the contracting parties merely. But that which depends merely upon will is not a proper subject for a suit at law.

Bynk. Quest. Jur. Pub. l. 1. c. 21. sub fine.

By the statute of 9 *Ann.* ch. 21. all vessels navigating within the limits of the exclusive trade of the *South-Sea* Company, were required to have a licence from the *South-Sea* Company. But now the 42 *Geo.* 3. c. 77. has repealed the necessity of a licence from either the *East India* or *South-Sea* Company for ships passing through the Straits of *Magellan*, or round *Cape Horn*, and trading in the *Pacific Ocean* from *Cape Horn*, to 180 degrees west longitude from *London*; whether they combine fishing with trading or not. This point is now further cleared by 55 *Geo.* 3. c. 57. and 141. See *Cowie* v. *Barber*, 4 *M.* and *S.* 16. where these acts of parliament do not appear to have been adverted to.

Toulmin v. Anderson, 1 Taunt. 227. Jacob v. Jansen, 3 Taunton, 534. Gill v. Dunlop, Hil. 56 Geo. 3. in C. P.

If a ship, though neutral, be insured on a voyage prohibited by an embargo, laid on in time of war, by the prince of the country, in whose ports the ship happens to be, such an insurance also is void. This depends upon the power of an embargo, the right of laying on which by the sovereign of this country in time of war is undoubted; although in time of peace it may be a different question. The right being admitted, it follows of course, that any act done in contravention of a proclamation of this nature, is illegal and criminal; because it is equally binding as an act of parliament, and a contract founded on such illicit proceedings is consequently void.

1 Black. Com. 270 Vide ante, 125.

This was determined in a modern case, upon a special verdict. It was an action on a policy of insurance on the *Bella Juditta*, a *Venetian* ship, *at and from London to*

Delmada v. Motteux, B. R. Mich. 25 Geo. III.

 Grenada,

Grenada, with liberty to touch at Cork and Madeira to load. The defendant pleaded the general issue; and the cause came on to trial before Mr. Justice *Buller*, when the jury found a special verdict, the material facts in which were these: — That the ship was a *Venetian* vessel, and the plaintiff a subject of the state of *Venice*; that in *October* 1782, the ship sailed on her voyage from *London* to *Cork*, and there took in a loading of provisions, the property of *French* subjects, the enemies of the King of *Great Britain*. That the said ship, having taken in at *Cork* clearances and bills of lading for *Madeira*, an island belonging to the King of *Portugal*, sailed in *December* 1782, from *Cork* to that island, at which she was neither to unload any part of her cargo, nor to receive any goods on board, but where she took clearances and bills of lading for the island of *St. Thomas*, belonging to *Denmark*, whither she was not destined: that on her voyage from *Madeira* to *Grenada*, within 14 leagues of the latter, she was captured by an *English* man of war as prize, and carried to *St. Lucia*: that when the ship sailed from *London*, and from thence till after the capture, *Grenada* was in the possession of the *French* king. The special verdict further finds, that His Majesty, on the 18th day of *August* 1780, laid an embargo upon all ships and vessels laden or to be laden in the ports of the kingdom of *Ireland* with black cattle and hogs, beef, pork, butter, and cheese, or any sort of provisions. It is also found, that after the capture, a suit was commenced in the Vice-admiralty Court at *Barbadoes*, against the said ship and cargo, as belonging to the *French* king, or to some of his subjects; and the Judge of that court did condemn the cargo as the property of the enemies of the King of *Great Britain*, which sentence was appealed from, and is now depending: that the Judge of the said Court of Vice-admiralty was of opinion, that the said ship *Bella Juditta* was the property of *Abram Delmada* the plaintiff, and ordered that the ship should be restored; but he did not conceive the owner of the said ship to be entitled to any freight, or damages occasioned by the capture, because she was engaged in a wrong act, and the captor did no more than his duty; that the said ship was accordingly restored.

Upon this verdict, the question for the Court to decide in point of law, was, Whether the insurers upon the ship on this voyage were liable to pay for this loss of freight, and the damages occasioned by the capture?

Lord

Lord *Mansfield*.—"Is this voyage not a breach of the embargo? The King in time of war has an undoubted right to lay an embargo: in time of peace it is another question. Every power lays them on. If the ship had only been carrying goods of an enemy on a voyage lawful for her to perform, she might have been entitled to freight. But here the sentence says, she shall not. And why? because she has done a wrong thing. It is a fraud; for under colour of a neutral port, she goes to an enemy's port. She breaks an embargo. What the consequence of that is, has not as yet been settled: but to break an embargo is undoubtedly a criminal act; and wherever a man makes an illegal contract, this Court will not lend him their aid." The defendant accordingly had judgment.

Though an insurance upon a smuggling voyage, prohibited by the revenue laws of this country, would be void under the principle above stated; yet the rule has never been supposed to extend to those cases, where ships have traded, or intend to trade, contrary to the revenue laws of foreign countries, because no country takes notice of the revenue laws of another: in such cases, therefore, the policy is good and valid; and if a loss happen, the underwriter will be answerable.

Thus in the case of *Planche* against *Fletcher*, which was stated at large in a preceding chapter, one of the objections taken to the insurance was, that there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, although she was never designed to go to that place. But Lord *Mansfield* declared, for himself and his brethren, that it was no fraud on the underwriters, perhaps on nobody. The reason for clearing for *Ostend*, and signing bills of lading as from thence, did not fully appear: but it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours, and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Ostend* duties rather than stop the trade by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue-laws of another.

Vide ante. c. 10. p. 303.

In another case, a short time afterwards, at *Guildhall*, Lord *Mansfield*, in his charge to the jury, advanced the same doctrine which had been established by the whole Court in the preceding case.

Lever v. Fletcher, Lond. Sitt. Hil. Vac. 1780.

It was an action on a policy of insurance, at and from *London* to *Pensacola* and *Manshae*, in the river *Mississippi*, with liberty to touch at *Portsmouth* and *Jamaica*. The ship insured was employed in the usual trade in the river *Mississippi*, and traded at *Little Manshae*, on the island of *New Orleans*, part of the dominion of *Spain*. *Manshae*, the place mentioned in the policy, is part of the continent of *North America*, on that side of the river which *France* and *Spain*, by the treaty of *Paris* in 1763, surrendered to *Great Britain*, and is about 37 leagues higher up the river than *New Orleans*. The loss happened by a seizure of the ship at *Little Manshae* by the *Spanish* governor, as a reprisal for transgressions alleged to have been committed by a King's ship in the *Lakes*. The counsel for the defendant contended, that the policy in question was on a trading voyage, and that the trade itself was an illicit one.

Lord *Mansfield*.—"The first question is, Whether this policy covers the trading on the *Mississippi* before the ship's arrival at *Manshae*? The trading at *Little Manshae* is a delay of the voyage, and an increase of the risk. If the policy do not cover this part of the trading, then it is a deviation, and there is an end of the contract, at least so as to prevent the plaintiff from recovering. It is very clear what the trade is. Every trading with the subjects of *Spain* is illicit by the treaty of *Paris*. The navigation is free to both countries; and the municipal laws of both countries remain. *Though such trading be contrary to the laws of* Spain, *yet no country pays attention to the revenue-laws of another. Therefore, if the defendant had, with full knowledge that it was a smuggling trade with* Spain, *made the insurance, then it might be a fair contract between the parties.* But the main question for consideration seems to be, Whether this trading at *Little Manshae* was insured by the policy?" The jury found for the defendant; and it may be presumed on the ground of deviation.

It cannot be improper, because it is nearly connected with the subject before us, to enter upon the enquiry, How far trading with an enemy in time of actual war, is legal? The opinion of foreign writers upon this point, cannot fail to afford information upon the question. It has long been settled in *France*, that all trading with enemies is illegal. This indeed is given as the reason for requiring to be inserted in the

Guid. c. 2. art. 2, 3. and 5. 2 Val. 31.

policy

policy of insurance, the name and place of abode of the insured, the effects upon which the insurance is made, the name of the ship, and the place of loading and unloading. By complying with such a requisition, it is known in time of war, whether, notwithstanding the prohibition of commerce, which, according to these writers, a declaration of war always imports, the subjects of the King continue to trade with the enemies of the state, or with their friends and allies; by which means they would be able to convey warlike stores, provisions, and other prohibited goods to the enemy. But every thing of this kind being forbidden, as prejudicial to the state, would be liable to confiscation, and to be condemned as prize, whether found in ships of our country, or of friends and allies. The prohibition to insure the property of an enemy, which is almost generally established by the ordinances of foreign countries, proceeds upon the principle, that it is unlawful to trade with an enemy: because if commerce were allowed to be carried on between the hostile nations, there could not possibly be an objection to protect that commerce by means of the contract of insurance.

Bynk. Q. Jur. Pub. lib. 1. c. 3.

Ord. of Stockholm, &c. 2 Mag. 277.

The general law of *England* had not, till lately, laid down any express rule upon the subject; but we must take notice of what has passed in the courts of justice upon the question. The only ancient cases to be found in the books upon the subject are two; the one is in *Roll*'s Abridgment, and happened in the 13th year of the reign of *Edward* the Second. A licence granted to certain merchants to buy and sell in *Scotland*, which was then at war with the King of *England*, was declared to be void; and consequently the trading held to be illegal. The other was a case put to the Judges, in the time of Lord *Somers*, for their opinion upon the point, whether sending corn to the enemy, in time of war and famine, was a crime at the common law. The Judges held it was a misdemesnor. It is to be observed, however, that the last was a case where provisions were supplied, which, as well as warlike stores, must be prohibited from the nature of the thing.

2 Roll. Abr. 173.

1 Term Rep. p. 85.

The first modern case, in which trading with an enemy came at all under consideration, although it did not then meet with any decision, was that of *Henkle* against the *Royal Exchange* Assurance Company, before Lord *Hardwicke* in the Court of Chancery, which upon a former occasion was cited much

1 Ves. 317.

Vide ante, C. 1.

much at length. His Lordship there said,—it might be going too far to say that all trading with enemies is unlawful: for that general doctrine would go a great way, even where only *English* goods are exported, and none of the enemy's imported, which might be very beneficial. He was not satisfied with the answer given to the objection of an illicit trade, by citing the case of the *South-Sea* Company; for that by no means determined the question. That was not a trading contrary to the law of this country; but contrary to the agreement of the company: which is different from a contract repugnant to the general law of the country, whether statute, common, or maritime law. The same answer might be given to Sir *Robert Nightingale*'s case, which was merely a plea in the Exchequer, upon the private right of the company, being contrary only to their statutes, and not to the general law of the land.

Gist v. Mason, 1 Term Rep. 84. From this opinion, it is evident that the question was by no means settled in Lord *Hardwicke*'s mind: but in a subsequent case, Lord *Mansfield* strongly argues, that trading with an enemy is not forbidden by the general law of the country; for he says, that several acts of parliament have been *specially* passed, in order to make such trading illegal, which proves that the legislature did not think it was so before. The ship, indeed, in the last of these cases, appeared to be neutral; and the Court laid it down, that it had no where been held that an insurance upon a neutral ship trading to an enemy's port was void. But then Lord *Mansfield* went upon the doctrine of a subject's trading with enemies, and concluded thus:— By the maritime law, trading with an enemy is cause of confiscation, provided you take him in the act; but this does not extend to neutral vessels.

Potts v. Bell, 8 Term Rep. 548. This question is now for ever at rest in the law of *England*, by the decision of the Court of King's Bench, upon a writ of error from the Court of Common Pleas, in which it was held by Lord *Kenyon*, *Grose*, *Lawrence*, and *Le Blanc*, Justices, that it was a principle of the common law, that trading with an enemy, *without* the King's licence, is illegal in *British* subjects.

In pronouncing this judgment, the Court referred generally to the principles and reasons advanced, and the long chain of authorities quoted by Sir *John Nicholl*, the King's advocate, in

his most clear and lûminous argument at the bar, to which (it being impossible to do justice to it in an abridgment) the reader is referred in the 8th volume of the *Term Rep.* p. 554.

If a *British* subject is interested in part of the cargo on a *valued* policy, he may recover to the extent of it on a count averring the interest in himself; although alien enemies may be interested in other parts of the cargo. Feise v. Aguilar, 3 Taunt. 506. Cohen v. Hannan, 5 Taunt.

This power of licensing particular trades with hostile states in time of war, is a part of the prerogative of the crown, inherent in itself, receding in that respect from its own rights in time of war; and for the time, for the purposes, and to the extent in the licence mentioned, turning the state of war into a state of peace. But as various restrictions were imposed by statutes the King of course could not, by virtue of his prerogative, dispense with them; and therefore it was necessary for the legislature, during the long, protracted, and unexampled mode of warfare in which this country was engaged for upwards of 20 years, to pass various acts of parliament, empowering the sovereign to do that, which he should think advisable, and which his prerogative alone had not enabled him to effect. The material statutes, (and I only think it necessary to refer to the years and chapters, because, as they were only of a temporary nature, so I trust the dreadful situation of things which gave rise to them never will again return,) were the 43 *G.* 3 c. 153. 45 *G.* 3. c. 34. 46 *G.* 3. c. 111. 47 *G.* 3. c. 27. 48 *G.* 3. c. 37. 48 *G.* 3. c. 126. 49 *G.* 3. c. 25. & 60.

By virtue of the power granted to the King by these statutes and his own royal prerogative, the trade of this country was preserved: for the sovereign had thus the power of giving an enemy liberty to export or import; he might place whole districts of hostile countries in a state of peace, and might exempt individuals, either his own subjects or those of other nations, from the operations of war.

Though the King was thus empowered to license, he might also qualify his licence, in which case the party seeking to protect himself under it must conform exactly to its requisitions. The questions which arose in our common law-courts upon the constructions of these licences, granted under statutes, were extremely various: but as they turned in many

cases

cases upon the precise words used; as at one time a more strict construction was put upon them than at others; and as most of those cases have been discussed in the Court of Admiralty by the very learned Judge, Sir *Wm. Scott*, who presides in it, with a profundity of learning and accuracy of judgment seldom equalled, never surpassed, it is impossible, without swelling this work to a most inconvenient length, to attempt to follow the decisions, either in one Court or in the others. Nor is it very material to do so, as neither questions of fact, nor the construction of particular documents, unless some general rule arises out of them, can be very material, and as the main question in all of them was much discussed when the cases of *Usparicha* v. *Noble*, *Menett* v. *Bonham*, and *Flindt* v. *Crokatt*, (see *ante*,) were decided. To those who have time for such researches, much advantage will be derived from the perusal of the judgments before referred in *Robinson*'s, *Edwards*', and *Acton*'s Reports in the Admiralty; and in our Courts of Common Law, in addition to the cases already detailed and referred to in this work, are those of *Schroeder* v. *Vaux*, 15 *East*, 52. *Blackburne* v. *Thomson*, 15 *East*, 81. *Rucker* v. *Allnutt*, 15 *East*, 278. *Siffken* v. *Allnutt*, 1 *Maule* & *S.* 39. *Hagedorn* v. *Bell*, 1 *Maule* & *S.* 450. (*a*)

Vandyck v. Whitmore, 1 East's Rep. 475.

So also, where the licence to trade was on the express condition, that bond be given in such penalty by such persons, and in such manner, as the commissioners of the customs shall direct, that the goods shall be exported to the places proposed, and to no other; and that a certificate shall be produced within six months from the *British* consul, or other person there described, that the goods have been landed; if the bond be not given, the licence is void, the voyage illegal, and cannot be insured.

(*a*) A wrong description or addition of the person will invalidate the licence: for instance, if it says *A. B.* of *London*, merchant, whereas he is then of *Heligoland*, having no house of trade in *London*. *Klingender* v. *Bond*, 14 *East*, 484. And if the licence contain a condition which is only *colourably* complied with, it shall be deemed a fraud upon the licence and avoid it. *Gordon* v. *Vaughan*, 12 *East*, 302. note (*b*). And the person having the licence must shew he was authorized to obtain it. *Rawlinson* v. *Janson*, 12 *East*, 223. And if the licence be general, he must shew by evidence that his use of it was lawful, from whom and when he received it, and how he connects his own particular adventure with it. *Barlow* v. *M'Intosh*, 12 *East*, 311. *Bush* v. *Bell*, 16 *East* 3. and *Robinson* v. *Morris*, 5 *Taunt.* 720.

A simi-

A similar decision had been made in *Vanharthals* v. *Halhead*, *Mic.* 31 *Geo.* 3. on the stat. of 16 *Geo.* 3. c. 5. on which the case of *Johnston* v. *Sutton*, *ante*, page 353. had been decided. 1 East's Rep. p. 487. note (*a*).

The King's prerogative, of licensing the trading with an enemy, under such restrictions as he shall be pleased to direct, being thus established, and it being also settled that the party, to entitle himself to the benefit, must conform to the stipulations of the licence, still the courts of justice will permit every thing to be done, though not expressed, which is necessary in order to effectuate the intention of His Majesty in granting the licence, *ut res magis valeat, quam pereat.* Thus in a case lately decided in the Court of King's Bench, upon a bill of Exceptions tendered to Lord Chief Justice *Mansfield* at *Nisi Prius*, in the Court of C. P., the following facts appeared in evidence, and which are all that are material for the discussion of this point. The plaintiffs in the Court below brought their action against Mr. *Kensington*, an underwriter, on a policy dated *Feb.* 1800, at and from the *Havannah* and *Matanzas*, or any other port or ports in *Cuba*, to *Nassau*, *New Providence*, upon goods, and also upon ship or ships sailing between two given periods of time. The declaration averred that *Kensington* subscribed the policy for 500*l.* on *goods and specie*, and that by a subsequent memorandum, it was agreed that *the value of any vessel or vessels that should carry the goods insured should be included in that insurance:* and that *Robert Read*, for whose benefit the insurance on the goods and specie was made, was interested in such goods and specie, and that one *Juan Villas*, for whose benefit the insurance on the ship *Hector* was made, was interested therein. The second count of the declaration averred that the ship *Hector*, on board which the goods and specie were loaded, did not belong to His Majesty, or any of his subjects. Kensington v. Inglis, in Error, 8 East's Rep. 273.

The bill of Exceptions, amongst the other necessary facts not material here, stated that *Inglis* and Co. effected the policy, and that a certain cargo of goods and specie belonging to *Robert Read* had been shipped at the *Havannah* on his account, being part of the property insured, on board the *Hector*, and that the policy was made in respect of the said goods and specie for his benefit, and in respect of the said ship for the benefit of the said *Juan Villas*, *and that Juan*

Villas

Villas was a Spaniard by birth, then and still residing in the dominions of, and adhering to, the King of Spain, between whom and the King of Great Britain there existed an open war, as well at the time of effecting the policy, as also at the time of trial; but that the action was commenced in time of peace. The loss of the ship by perils of the sea is then stated between the *Havannah*, a colony of the King of *Spain*, and *Nassau*, a colony of our King. The bill of Exceptions further stated, as applicable to this point, His Majesty's Instructions to General *Dowdeswell*, Governor of the *Bahama Islands*, (*New Providence* being one,) authorizing him *to grant licences* for the importation into those islands of specie and such goods as were loaded on board the *Hector*, in any *British* or *Spanish* vessel of a certain built, (within which the ship *Hector* might be classed,) from any *Spanish* colony in *America*, *notwithstanding the then existing hostilities*: and the commanders of His Majesty's ships, and also privateers, *were enjoined not to detain or molest any vessel trading between the ports therein specified*, conformably to the said regulations, *and having a licence for that purpose*. It further appeared that a licence was granted by the governor to *Robert Read*, for the *Hector* for the voyage out and home, and was not limited in point of time, and was to enable the *Hector* to bring the goods therein enumerated from the *Spanish* settlement to *New Providence*: that by the laws of *Spain* vessels coming from a *Spanish* settlement, in time of war, cannot clear for a *British* port, but it is the practice to clear for a *Spanish* or neutral settlement: that the witness (who was the governor's secretary) knew the *Hector* to be a *Spanish vessel*, and the property of a *Spaniard*, and she was so described in the licence. Upon this point, the counsel for the underwriter, *Kensington*, objected at the trial, that although the voyage and trade were licensed, the plaintiffs *Inglis* and Co. could not enforce a policy for the benefit of *Juan Villas*, so being *such alien enemy* as aforesaid. But the Chief Justice *Mansfield* was of opinion, that a ship belonging to an alien might, *when so licensed*, be lawfully insured by a *British subject*; and that the policy so effected might be enforced by such *British* subject in a court of law, for the benefit of such alien owner. This opinion was excepted to; and after argument upon the bill of Exceptions, in which it was contended, that the licence only protects the goods,

goods, but does not give to an alien enemy the right to sue either in his own name, or in the name of his trustee, the Court took time to deliberate; and now

Lord *Ellenborough* delivered the unanimous judgment of the Court. As to the second question, whether the plaintiffs upon this record, who are *British* subjects, duly competent to sue in their own persons, can in a court of law enforce by suit a policy for the benefit of another person, who was an alien enemy when the policy was effected, was so at the trial, and still is so; the negative is strongly contended for on behalf of the underwriter, on the authority of the cases of *Bristow* v. *Towers*, 6 Term R. 35. and *Brandon* v. *Nesbitt*, ibid. 23. But it will be recollected that in those cases the *party interested, and on whose behalf the suit was maintained, was an alien enemy*, against whose recovery, through the medium of his *British* trustee there existed this objection, that the property to be covered by the policy belonged to an alien enemy, and that any protection afforded to such property, by means of a contract of indemnity, directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present instance no such public policy of the country is contravened by sustaining and giving effect to such a trust; but on the contrary, this country, in furtherance of the same policy, which allows the granting of licences to authorise the trade, ought to give effect to the ordinary means of indemnity, by which that trade (from the continuance of which the public must be supposed to derive a benefit) might be best promoted and secured. And although the King's licence cannot, in point of law, have the effect of removing the personal disability of the trader, in respect of suit, so as to enable him to sue in his own name; it purges the trust, in respect to him, of all those injurious qualities in regard to the public interest, which constituted the public ground of objection to the trust in the two cases just referred to, and which have been so much relied upon on the part of the plaintiff in error. As therefore there is in this case no legal incompetence to sue in the parties actually suing, and no public interest which stands in the way of maintaining this suit, for the benefit of those who were the objects of the licence authorising the trade in question, it does not appear to us that the right of the assured to recover can well be resisted on that ground.

The 1st question was upon a point of Evidence. The third point is referred to in Ch. 1. p. 46.

See these cases, post. p. 369.

It

Schroeder v. Vaux, 15 East, 52. It was questioned, whether it was necessary, where a ship was licensed for a given time, that the whole voyage must be concluded within that time, Lord *Ellenborough* and the whole Court of King's Bench were of opinion, that it never was intended that if the adventure licensed were *bonâ fide* prosecuted within any part of the time mentioned, it should become illegal because by some accident the voyage was protracted beyond that period. The same doctrine has always been held in the Court of Common Pleas, for if the voyage cannot be completed within the time, by circumstances which the assured cannot control, clear of all fraud and laches on his part, the burden of proof resting on him, the voyage is still protected.

Freeland v. Walker, 4 Taunt. 478. and Lewis v. Cormac, 4 Taunt. 483, in notes.

The next question which comes to be considered is, Whether it be lawful to insure the property of an enemy, when not protected by a licence? Whatever doubts might formerly obtain in *England* either as to the legality or expediency of such insurances, the question is now finally settled in the negative by two unanimous decisions of the Court of King's Bench. (*a*)

R. Brandon v. Nesbitt, 6 Term Rep. 23. The first of those cases was an action on a policy of insurance *on goods* on board the *Greyhound*, an *American* ship, at and from *London* to *Bayonne*; there was an averment in the declaration, that the policy was effected for the benefit and on the account of *David Brandon*, *Isaac* and *David Valery*, and others who were interested in the goods; and another averment that the ship was captured as prize. The defendant pleaded that the persons, in whom the interest was averred to be, were aliens born; and that, before the ship sailed, they were become alien enemies of our King.

The second plea stated, that the persons interested were living in *France*, and enemies, and that the goods were sent from *London* after the commencement of the war, for the purpose of being landed and delivered in *France* to the king's

(*a*) Lord *Alvanley*, in delivering the judgment in *Furtado* v. *Rogers*, 3 *Bos. & Pull.* 191, supposed that these cases were decided upon the ground of *alienage* only. Without presuming to question His Lordship's opinion, it was become immaterial, for in that very case the opinion of *C. B.* is declared to be that such insurances were illegal by the common law; and all the other cases have proceeded on that principle.

 enemies.

enemies. (*a*) The replication to the first plea stated that the persons interested were indebted to the present plaintiff in more than the value of the goods insured. The replication to the second, that the goods insured were not prohibited at the time of the policy, and that they were shipped before the commencement of the war. To these replications there were demurrers.

Lord *Kenyon*, in giving the opinion of the Court, said, that they had considered this case, and unless any thing more could be urged at the bar to shake the opinion they had formed, they were of opinion, that judgment must be given for the defendant; on this ground, that an action will not lie either by or in favour of an alien enemy. (*b*)

This case, at first view, may appear to proceed merely upon the special plea; but in the same term another case was argued upon a special verdict, in which the only point discussed was the legality of insurances on enemy's property; and the principle of the decision in *Brandon* v. *Nesbitt* was held so clearly to control the other, that, on the authority of that decision, the counsel for the plaintiff abandoned the second argument, which the Court had ordered. Bristow v. Towers, 6 Term Rep. 35.

The special verdict stated, that the plaintiff, on the 13th *March* 1793, being then resident in *Great Britain*, in pursuance of an order for that purpose, caused the insurance in question to be made on account of *Arrouet*, *Massot*, &c. and that *the goods* insured were by the policy warranted *French* property, and were so in fact; that the goods, which consisted of buttons, buckles, *&c.* of the manufacture of this kingdom,

(*a*) In a plea of alien enemy, the defendant must state that the plaintiff was born in a foreign country at enmity with this country, and that he is not residing here under letters of safe-conduct from the king. *Casseres* v. *Bell*, 8 *Term Rep.* 166.

(*b*) By an act of parliament, which passed during the war, " for more " effectually preserving money or effects, in the hands of His Majesty's " subjects, belonging to, or disposable by, persons resident in *France*, for " the benefit of the individual owners thereof," commissioners were to be appointed for carrying the purposes of the act into effect: and by the 17th sect. of the statute, the commissioners were empowered to direct the money due on certain insurances to be paid; and, in case of refusal, actions might be brought with the approbation of the commissioners; and to such actions so brought under this authority, *alien enemy* is not pleadable. But I believe no such commissioners ever were appointed. 34 G 3. c. 79. s. 1.

were shipped on board the *Nancy* (an *American* ship), on the 19th *March* 1793, by Messrs. *Humphreys* of *Birmingham*, in compliance with orders received in *January* 1793, from Messrs. *Arrouet*, *Massot*, &c. who were and still are subjects of *France*: that by two orders in council of 11th *February* 1793, general reprisals were granted against the ships, goods, and subjects of *France*; and a general embargo was laid on all vessels in *Great Britain*: but by another order of 26th *February* the said general embargo was declared not to extend to foreign vessels belonging to the subjects of any state in amity with His Majesty, but that they might forthwith proceed on their respective voyages, provided the cargo did not consist of naval or military stores, or any other article, the exportation whereof was prohibited by any law or order of council then in force. The verdict then states the sailing of the ship on the voyage insured on the 21st *March* 1793, the subsequent capture of the vessel by some *English* subjects, and the condemnation of *the goods insured* as *French* property.

This special verdict was fully argued at the bar, and a second argument was ordered: but after the decision of *Brandon* v. *Nesbitt*, the counsel for the plaintiff said, that he declined the further argument of the case, as he had no hopes of convincing the Court that this case could be distinguished from the principle on which the former had been so recently determined.

Lord *Kenyon*. — "It appears to the Court in the same light, and there must be judgment for the defendant."

This important case has decided that the insurances of enemy's property are generally unlawful: but as the learned Judges had not an opportunity of entering into the reasons of their judgment, it cannot be impertinent in a work, which professes to be a system of the law of marine insurances, to give a summary of the arguments on both sides of a question, which has been once or twice discussed in parliament, upon which very eminent men have entertained different opinions, although till lately it has never come fully and precisely in judgment in a court of common law.

Those who argue in favour of such insurances insist, that it would be of very dangerous consequences, by a prohibition of the nature alluded to, to strip ourselves of a branch of trade, which we now enjoy almost without a rival, as more of

this

this business is done in *England* than in all the rest of *Europe*. That not only the nations, with whom we are at peace, but even those with whom we are at war, transact all this business in *London*; that the advantage thence derived to the kingdom is obvious, for premiums produce a great balance in our favour, and where there is no capture, the trade of the enemy pays a tax to this country for its safety. On this ground, it has been also urged as a fact, that important intelligence has, by means of such insurances, been frequently obtained of the enemy's designs; and that in several wars, some of the richest prizes have fallen into our hands by information communicated by those employed to procure insurances upon them. With respect to the legality of such contracts, they contend, it never has been disputed, that they had been effected in all former wars without interruption, except when prohibited for about six months by the statute 21 *Geo.* 2. c. 4., and had not only been effected, but recovered upon in courts of justice, the objection of enemy's property never having been made. That the opinion of Lord *Hardwicke*, as delivered in *Henkle* v. *Royal Exchange Assurance*, and that of Lord *Mansfield*, frequently declared in parliament, and on the Bench, was strongly in favour of such insurances. That the latter of these two illustrious Judges, almost the last time he sat in court, adhered to that opinion; for in the course of his direction to a jury, delivered so lately as 1786, he said, "It is for the benefit of this country to permit these "contracts upon two accounts: the one, because you hold "the box, and are sure of getting the premiums at least as a "certain profit; the other, because it is a certain mode of "obtaining intelligence of the enemy's designs, and I have "known instances of intelligence procured by such methods." That the statutes, passed in the 21st *Geo.* 2. and in the 33d of the present reign, to prohibit such insurances, prove, by being partial in their operation, and limited in their duration, that in the opinion of the legislature these contracts were not prohibited by the general law of the land. Indeed, trading with an enemy does not itself seem to be contrary to law. For although some foreign writers condemn it, they do not advert to the method of carrying it on by the medium of neutral nations. Declaration of war does not necessarily import a prohibition of commerce; and wherever it may be

1 Ves. 320.

Gist v. Mason, 1 Term. Rep 84. and MS. note of same case.

33 Geo. 3. c. 27. s. 4.

 conducted

conducted beneficially to a belligerent power, it is, as far as respects such power, perfectly justifiable. Even the writers on the law of nations enumerate instances of commerce being carried on between belligerent powers, by express stipulation, which is sufficient to shew that all commerce, by a declaration of war, is not of necessity interdicted. That this has been the opinion in *England*, the practice of the legislature in all former wars strongly proves, for they have passed statutes adapted to the exigence of the times, considering the subject in a light merely political; some of them imposing a general prohibition, though the restraint was frequently afterwards in part taken off; some which in the first instance imposed a partial restraint only; and some, which actually sanctioned a trade with an enemy, which in time of peace was illegal: the two first classes would have been wholly nugatory, if the doctrine, that insurances of this nature were illegal, had ever prevailed. Such statutes have been passed in every war from the reign of *Charles* the Second to the present time; which prove demonstrably, that parliament conceived a legislative prohibition was necessary to make the trading illegal, otherwise all or most of the acts alluded to would have been unnecessary and superfluous.

Bynk. Quæs. Juris. Pub. lib. 1. c. 3.

On the other hand it is contended by those who hold the insurance of enemy's property to be illegal and impolitic, that by the declaration of war, all commerce immediately and necessarily becomes prohibited between hostile nations; and if so, it follows that insurances must also be forbidden; for it cannot be lawful to do that indirectly, which is not permitted to be done directly. Instances of trading with enemies to be found in writers on general law, by express stipulation, only shew that governments occasionally make exceptions from the general rule to suit their own convenience; and to this source all the special statutes alluded to are referable; some of which, too, contain regulations of particular branches of commerce. Even where they extend to general prohibitions of trade with an enemy, it is for the purpose of superadding special penalties for checking bold offenders, who are not to be deterred by the ordinary prohibitions of the law, an observation which fully applies to the statute of 21 *Geo.* 2, and to the Traitorous Correspondence bill just alluded to. But all the writers upon insurance concur in the illegality of such contracts. The author

author of *Le Guidon*, a work of great repute, published by Mons. *Clerac* about the middle of the 17th century, is explicit upon the point; and the editor of the work observes, that this opinion is conformable to the ordinances of *Barcelona*, which passed so long ago as 1484. *Valin*, in his commentary, concurs in declaring the same law, and relates that by the *English* insuring *French* property in the then last war, one part of the nation rendered back to *France* what had been taken by the other *jure belli*. *Bynkershoek*, to whose writings mankind are much indebted, dedicates a whole chapter of his work to this subject, and argues strongly both against the legality and expediency of such contracts. In the only two cases, in which the legality of trading with an enemy came in question in *England* (see *ante*, p. 369), it was held to be illegal. Even the expediency of such contracts is greatly to be doubted. The *English* insurers, who deal at a cheaper rate, and fulfil their engagements more punctually than those of other nations, will, in time of peace, easily regain such branches of that trade, as, by a prohibition during war, may be diverted into other channels. With regard to the supposed profit, that must ever be a matter of great uncertainty, for the premiums are not clear profit. In cases of capture, there is no loss to the enemy, and no gain to us: in losses by perils of the sea, we bear the whole burden, and there is actual gain to them, deducting indeed the premium in both cases. In a national point of view the detriment derived to us from the support afforded to the commercial resources of our enemies is beyond all computation. Our insurers, too, are by this traffick rendered bad subjects of the country, by being interested against the success of our own cruisers, in favour of the enemy's escape. The argument of procuring intelligence of the enemy's plans by these means is fallacious in the highest degree; for it never can be supposed, that underwriters would be the means of betraying the ships insured into the power of our cruisers, by which they would be the greatest sufferers; on the other hand, the temptation must be very strong to them to afford such intelligence to the enemy of the sailing of our armed vessels, as may put them on their guard, and prevent them from falling into our hands. That such intelligence had been given to the enemy was asserted as a fact in the debates in parliament in 1747; and the general law of the land will not

Le Guidon, c. 2. s. 5.

Valin, liv. 3. tit. 6. art. 3.

Bynk, Q. Jur. Pub. lib. 1. c. 21

not tolerate a contract, which may lead the subject into so strong a temptation to betray his duty. Even the opinions most favourable to this species of contract have never gone further than to contend, that insurances upon enemy's property from a friendly or neutral port, or from one hostile country to another, were legal; but till the late cases of *Brandon* v. *Nesbitt* and *Bristow* v. *Towers*, it never was attempted to be argued, that an insurance could legally be made on enemy's property, sailing directly from this country to that of the enemy. Such is the sum of the argument on both sides of this great question, which is probably now finally closed. (*a*)

Furtado v. Rogers, 3 Bos. & Pul 191. The Courts, in order to prevent effectually all insurances upon enemy's property without a licence, have decided, that a policy on a foreign ship must be understood as virtually containing an exception of all captures made by the authority of our own government. A policy containing an insurance against *British capture, eo nomine*, would be illegal, and void upon the face of it, as being directly and obviously repugnant to the interests of the state, having an immediate tendency to render ineffectual, to the extent of the indemnity created thereby, all offensive operations by sea, adopted on the part of His Majesty and his subjects, for the purpose of weakening the strength, and diminishing the resources of the enemy. And if so, an insurance *indirectly* producing that effect, by the application afterwards of the *general* terms of the insurance to the *particular* event, that is, of *British* capture, must, upon principle, be equally illegal: and no peril, the subject of insurance, can be covered under the generality of the terms, "*capture, detention of princes,*" or the like, which could not, consistently with law, be specifically insured against in direct and express terms. (Kellner v. Le Mesurier, 4 East's R. 396.) The Court extended the same principle to a case where the insurance was made on *French* property by a *British* underwriter in time of peace, and where the action (Gamba v. Le Mesurier, 4 East, 407.)

(*a*) But a *British* agent effecting an insurance for alien friends, who continued so till after the loss, is entitled to recover against the underwriter, if he only plead the general issue; for such temporary suspension during the war of the assured's right of suit, legal at the time of the contract, and liable to be enforced upon the return of peace, cannot be taken advantage of, under a plea of perpetual bar, which the general issue is, there being no legal disability in the plaintiff to sue.—*Flindt* v. *Waters*, 15 *East*, 260.

was not brought till peace was again restored; but the capture was made by His Majesty's ship during hostilities between this country and *France*.

And in furtherance of the same principle, an insurance on goods on a voyage from *London* to *Bayonne* in *France*, shipped on board a neutral ship, on account and at the risk of *Frenchmen before*, but exported *after*, the declaration of hostilities between *Great Britain* and *France*, cannot be enforced against the underwriter, even after the restoration of peace, to recover a loss *by capture of a co-belligerent* (though not stated to be an ally) *of* Great Britain *during the war*. For the Chief Justice (Lord ELLENBOROUGH) expressly said, in delivering the judgment of the Court, where an insurance is upon goods *generally*, a proviso to this effect shall, in all cases, be considered as engrafted therein, namely, "*provided that* "*this insurance shall not extend to cover any loss happening* "*during the existence of hostilities between the respective* "*countries of the assurer and assured.*" Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other. And in like manner, and upon similar principles of public policy, the risk of *detention of princes*, &c. must be understood to be restrained and qualified by an implied proviso, "*that it shall* "*not extend to cover any loss happening in the course of any* "*contraband adventure, in which the goods would become liable* "*to seizure as forfeited by the laws of this country.*" Brandon v. Curling, 4 East, 410.

But afterwards when it was insisted upon at the bar, that the express insertion of such memorandum, *insuring against* British *capture, seizure, and detention*, rendering the policy void, although it was made to cover a *British* risk, the Court did not decide the point, it not being necessary so to do: but the Judges were inclined to the opinion, that the memorandum would not vitiate the policy; and that the doctrine of *Kellner* v. *Le Mesurier* and of *Gamba* v. *Le Mesurier* must be taken with reference to the cases before the Court, they being insurances on *foreign ships*. Of this opinion, too, Lord *Alvanley* appears to have been in *Touteng* v. *Hubbard*, quoted in the Chapter on Capture and Detention of Princes, *ante*, p. 130. note (*a*); and see there also a reference to Lord *Ellenborough*'s opinion Lubbock v. Potts, 7 East, 449.

Bromley v. Heseltine, 1 Campbell N. P. Cas. p. 75.

opinion in *Page* v. *Thomson*, and *Visger* v. *Prescott*. In a subsequent case Lord *Ellenborough* was of opinion that though a neutral subject was resident in a place occupied by an enemy, an insurance on his goods to a neutral or friendly port, was valid. The plaintiff had a verdict, and the case never was carried further.

Barker v. Blakes, 9 East, 283. See this case for other points, ante, ch. 9.

So also the Court of King's Bench lately held, that it was no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country, the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country, though the neutral thereby subject his ship to be detained and carried into a *British* port for the purpose of search. Therefore the defendant, a *British* underwriter, after the condemnation of the enemy's goods, and the liberation of the rest, was held liable to *the neutral owners of goods insured* in the same ship whose voyage was so interrupted, either as for a total loss, if notice of abandonment upon the loss of the voyage be given in due time; or for an average loss, if such notice be given out of time.

There is one species of insurance which never could be made upon the ships or goods of an enemy, or even of a subject, and that is upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them: or upon ammunition, other warlike stores, or provisions; because, from the nature of these commodities, they are absolutely prohibited by the laws of all nations.

Having thus disposed of these two important questions, it will be proper to conclude, by stating what the principle is, which is laid down in this chapter, and supported by authority. All insurances upon a voyage generally prohibited by law, such as to an enemy's garrison, or upon a voyage directly contrary to an express act of parliament, or to royal proclamation in time of war, are absolutely null and void.

END OF THE FIRST VOLUME.

Printed by A. Strahan, Law Printer to His Majesty,
Printer-Street, London.